TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 424

EDWARD E. JENKINS, AS RECEIVER OF THE NATIONAL CITY BANK OF SALT LAKE CITY, UTAH; E. J. GROESBECK, TREASURER OF SALT LAKE COUNTY, UTAH, ET AL., PETITIONERS,

vs.

NATIONAL SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 2, 1927

CERTIORARI GRANTED OCTOBER 31, 1927

(32,876)

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 7409

NATIONAL SURETY COMPANY, A CORPORATION, APPELLANT,

vs.

EDWARD E. JENKINS, RECEIVER OF THE NATIONAL CITY BANK OF SALT LAKE CITY, UTAH, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

FILED MARCH 30, 1926.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 1, 1927

1 United States of America,
District of Utah—ss.

Pleas of the District Court of the United States for the District of Utah, at a stated term begun and holden at Salt Lake City, on the second Monday, being the thirteenth day of April, in the year of our Lord nineteen hundred and twenty-five and the one hundred and forty-ninth year of the Independence of the United States of America.

Present:

Honorable Tillman D. Johnson, United States District Judge for the District of Utah.

Transcript of the Record.

National Surety Company, a corporation, plaintiff,
No. 8851, vs Equity (Law)
Edward E. Jenkins as Receiver of The National City Bank of Salt Lake City, Utah, defendant,
vs.
E. J. Groesbeck and the American Surety Company of New York, a corporation, Interpleaded defendants.

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2 (Complaint.)

Filed in United States District Court District of Utah Apr. 28 1925 John W. Christy, Clerk.

Plaintiff complains of the defendant and for cause of action alleges:

1. That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of New York and is a citizen and resident of the State of New York and is duly authorized by its charter to engage in the business of suretyship, and is further duly qualified, under the laws of the State of Utah, to carry on said business of sure-

tyship in the State of Utah, and it is, and during all times hereinafter mentioned, has been engaged in said business in the State of Utah.

2. National City Bank of Salt City is a national banking association and a corporation organized and existing under the laws of the United States and in particular under the act of Congress known as the "National Banking Act," and has its office and place of business in the City of Salt Lake, State of Utah, and is a citizen and resident of said State of Utah.

3. That the defendant Edward E. Jenkins is a citizen and resident of the State of Utah. That on the 17th day of January, 1922, the said National City Bank of Salt Lake City, Utah closed its doors and thereafter the Comptroller of the Currency of the United States took possession of said National City Bank and appointed the defendant Edward E. Jenkins as Receiver thereof. That thereafter the said defendant Edward E. Jenkins, as such Receiver, took possession of the books, records and assets of every description of said National City Bank and as such Receiver is charged with the duty of and is proceeding to liquidate the business and assets of said Bank.

4. That the amount in controversy in this suit, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

5. That at all times herein mentioned Salt Lake County was and is a County duly organized and existing under the laws of the State of Utah; that Edward J. Groesbeck was, during all the times herein mentioned, and now is the duly elected, qualified and acting County Treasurer of Salt Lake County, and as such, among other things was required by the laws of the State of Utah to receive all moneys belonging to said Salt Lake County, to safely keep the same, and apply and pay out the same according to law.

6. That under the laws of the State of Utah, to-wit, Section 4500 Compiled Laws of Utah 1917, a County Treasurer is authorized to deposit the public funds in his custody in a bank, provided that he complies with said Section and requires such bank to furnish a good and sufficient surety company bond or personal bond sufficient in amount to fully protect such funds so deposited by him.

7. That prior to the 3rd day of January 1921, and while the said National City Bank was actively engaged in the business of conducting a national bank, the said Edward J. Groesbeck, as Treasurer of Salt Lake County, designated the

said National City Bank as the depository for the funds of Salt Lake County, Utah, and required that said Bank furnish a depository bond as required by law under the statutory provision hereinbefore referred to, in the amount of $125,000.00. That on December 22, 1920, the said National City Bank, pursuant to such requirement, requested
4 this plaintiff, National Surety Company, to sign, execute and deliver to said Edward J. Groesbeck, as such County Treasurer, and in its behalf, such a bond in the sum of $125,000.00, and as an inducement and the consideration for the execution of said bond, and prior to the delivery of the same to the said Edward J. Groesbeck, County Treasurer, the National Surety Company demanded and received from said National City Bank its written application and Indemnity Agreement for said bond, a true copy of which application and Indemnity Agreement is hereto attached, made a part hereof and marked Exhibit "A," whereby it made to the plaintiff the representations set out upon the face thereof, and wherein it did apply to the plaintiff for and requested that the plaintiff execute a bond on its behalf in the sum of $125,000.00, in favor of said Edward J. Groesbeck as such County Treasurer of Salt Lake County, to become effective on January 3, 1921, to qualify said National City Bank as such depository of County funds, under the statutes of Utah, and to protect the deposit of such County funds in said bank, up to the amount of $125,000.00. That following the representations contained in said application and as part thereof and by way of further inducement and consideration to the plaintiff to execute said surety bond in behalf of said bank, it did make to the plaintiff and with it entered into the Indemnity Agreement which is a part of said application as set out in said Exhibit "A", and to which reference is hereby made, and which provides, among other things that said Bank will at all times indemnify and keep indemnied the plaintiff and save it harmless from and against all claims, demands, liabilities, costs, charges, and expense of every kind and nature which it shall at any time sustain or incur and as well from or against all orders, judgments, and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the plaintiff, its successors and assigns, all sums and amounts
of money to meet every claim, demand, liability, cost,
5 charge, expense, suit, judgment or adjudication against it by reason of the execution of the Bond applied for and before the plaintiff shall be required to pay thereunder; and that the plaintiff shall have the right to look to and rely

upon the property of the Bank and its income and earnings, and to follow and recover out of the Bank's property now belonging to it, or which may hereafter belong to it, and the income and earnings thereof, for anything due or to become due the plaintiff under this Agreement, the execution of the said Bond by the plaintiff being for the Bank's special benefit and protection of the Bank's property, its income and earnings.

8. Pursuant to the said representations, Indemnity Agreement and other covenants contained in the said application for said bond, to-wit, Exhibit "A", and induced thereby, and upon the consideration of the payment of the premium therein provided, the plaintiff, on January 3, 1921, made, executed and delivered to said Edward J. Groesbeck as such County Treasurer, and became resonsible as surety for said Bank and on its behalf upon a depository bond in the amount of $125,000.00 unto Edward J. Groesbeck as Treasurer of Salt Lake County State of Utah, in the form as drawn and required by said Treasurer for depository bonds to be furnished by depositories of County funds, a true copy of which said bond is hereto attached, made a part hereof and marked Exhibit "B".

9. That thereafter, and while said National City Bank of Salt Lake City, Utah, was still engaged in the business of a national banking association, and between the said 3rd day of January 1921 and the said 17th day of January 1922, the said Edward J. Groesbeck did, from time to time, make deposits of said County funds in said Bank. That on the 17th day of January 1922, when the said National City Bank closed its doors and suspended business, there was on deposit in said National City Bank the sum of $643,094.29 of the funds of Salt Lake County, Utah, deposited by said
6 Edward J. Groesbeck as it Treasurer. That thereafter said Salt Lake County and Edward J. Groesbeck, its Treasurer, made formal demand in writing upon the plaintiff to make immediate payment of the said deposits, up to the amount of said bond, to-wit, $125,000.00. Pursuant to the said demand, plaintiff was obliged to and did on the 17th day of June 1922, pay to Edward J. Groesbeck as Treasurer of Salt Lake County, and to Salt Lake County the full sum of $125,000.00.

10. That heretofore and subsequent to the aforesaid payment, the National Surety Company duly transferred and assigned to the American Indemnity Company, a corporation,

of Galveston, Texas, $5,000.00 of its said claim of $125,000.00 hereinbefore set forth. That from the time of said assignment, continuously, said National City Bank has been and still is indebted to said National Surety Company, on account of the matters herein stated, in the sum of $120,000.00.

11. That heretofore and prior to the commencement of this action, to-wit, on April 10, 1925, this plaintiff duly presented to and filed with the defendant its verified claim herein for said sum of $120,000.00 by virtue of said Indemnity Agreement, a (true copy of which claim is hereto attached. made a part hereof and marked Exhibit "C",) and therein demanded that said defendant Receiver approve of its said claim as a creditor of said Bank, in the amount of $120,000.-00 by virtue of the Indemnity Agreement made, executed and delivered to it by said Bank, as hereinbefore alleged, by the terms of which Agreement the said Bank contracted that it would indemnify and save the plaintiff harmless from and against all claims and demands which it should at any time sustain or incur by reason of having executed said bond, and that it would repay to the plaintiff all sums of money paid out by it on account of any claims or demands made under said bond; but that the said defendant refused and now refuses to allow or approve said claim or to ay this plaintiff dividends thereon. That no part of said debt of said
7 National City Bank to this plaintiff, arising out of said Indemnity Agreement or otherwise or at all, has been paid by said Bank or anyone in its behalf, and that there are no setoffs or counterclaims to the same and that no assignments have been made excepting as above set forth.

12. That by reason of said Indemnity Agreement and said bond and the payment made by said plaintiff as hereinbefore alleged, there is now justly due and owing from said National City Bank and its Receiver to this plaintiff, the sum of $120,-000.00. That this plaintiff has demanded of said Receiver, and it is entitled, to have its said claim in said sum allowed and approved by said defendant Receiver and dividends paid to it in the amount and upon the same basis as heretofore paid to other claimants in the list of common claims against said Bank, and that all future dividends to be declared and made payable to said common creditors by said defendant Receiver, be paid to this plaintiff ratably with other creditors, upon said sum of $120,000.00.

Wherefore, plaintiff prays for judgment herein as follows:

1. That plaintiff's claim herein in the sum of $120,000.00 be allowed and approved and that plaintiff have and recover

judgment against the defendant herein, as Receiver of said National City Bank, in the sum of $120,000.00.

2. That the court enter judgment herein that the plaintiff is entitled to participate with the other creditors of said Bank upon its said debt of $120,000.00, ratably in all distribution of dividends, including all dividends yet to be paid, as well as those already paid by said defendant Receiver.

3. That the defendant Receiver be directed to pay to this plaintiff dividends in the amount and upon the same basis as paid to other claimants in the list of common creditors, and also that all future dividends to be declared and made payable to said common creditors, be paid to this plaintiff ratably with other creditors, upon said sum of $120,000.00.

8 4. For plaintiff's costs herein incurred.

ARTHUR E. MORETON
Attorney for Plaintiff.

State of Utah.
County of Salt Lake—ss.

Fred A. Moreton, being first duly sworn, deposes and says that he is an officer, to-wit, the Resident Assistant Secretary, of the National Surety Company, the plaintiff in the above entitled action, and as such officer is its agent and makes this verification for and on its behalf; that he has read the above and foregoing Complaint, knows the contents thereof and that the same is true.

FRED A. MORETON

Subscribed and sworn to before me this 27th day of April, 1925.

ARTHUR E. MORETON,
Notary Public
(Seal) Residing at Salt Lake City, Utah.

My Commission expires April 18, 1927.

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9 Exhibit "A".

"Safety First"
National Surety Company
Capital and Surplus over $8,000,000.00

Under Chapter 340 of the Laws of 1912 of the State of New York, any person obtaining property or credit by use

of a false statement is guilty of a misdemeanor punishable by fine or imprisonment or both.

Application By A Bank Or Trust Company For Depository Bond National Surety Company:

Application is hereby made by the undersigned for a bond the amount and tenor of which are herein set forth.

1. Name and Location of Bank or Trust Company. (Give correct corporate title) National City Bank of Salt Lake City, Utah.

2. Name of Obligee to whom bond is to run Edw. J. Groesbeck, County Treas.

3. Amount of bond, $125,000.00.

4. Maximum amount of deposit bond is required to secure $125,000.00.

5. (a) Specify rate of interest to be paid 2½ (b) Moneys covered by this bond: County.

6. Date from which bond is required: Jan 1, 1921.

7. Date upon which bond is to terminate Dec. 31, 1922.

8. Do you agree to pay $625.00 premium annually: Yes.

9. When was Bank or Trust Company incorporated and under the laws of what State was the incorporation had? Utah—1912.

10. Date of beginning business Feb. 1913. If reorganized, state when.....

11. Authorized capital $250,000.00.

12. Amount of stockholders' liability, if a State Bank $.....

13. When was last dividend declared, paid and amount:

14. When was the last examination made by National or State Bank Examiner? A. Nov. 29, 1920.

15. Do you belong to the Clearing House Association? Yes.

15a. If not, why do you not belong to the Association?

16. Give names and titles of the officers who give continuous personal attention to the affairs of the Bank or Trust Company.

10 Name	Titles
Frank Pingree	Cashier
W. G. Goodart	Asst. Cash.
Geo. N. Lambourne	President
J. P. Gardner	Vice Pres.
Henry W. Wallace	" "

17. By whom are the loans of the Bank or Trust Company directly authorized?

18. The following is a true financial statement of said Bank or Trust Company, showing its resources and liabilities at the close of business on the 22nd day of Dec. 1920.

Resources.

Loans and Discounts	2129631.70	
Amount of above loan to directors		
What amount secured by collateral $60550.00		
Amount of above loans to officers, not directors, approved by directors		
What amount secured by collateral		
Overdrafts, secured, $.....:		
unsecured	3262.31	
U. S. Bonds to secure Circulation	250000.00	
U. S. Government, State & Municipal bonds	1327227.12	
Other stocks, bonds, mortgages		
Banking House, $.....:		
Furniture & Fixtures	100000.00	
Other Real Estate owned		
Due from approved Reserve Agents	$476236.47	
Due from other Banks and Bankers	521313.10	
Checks and other Cash Items	20992.73	2118542.30
Fractional Currency, Legal Tender Notes, Specie, etc.		
Total		
Other Resources		12500.00
Total Resources		5941163.43

Liabilities

Capital Stock paid in	250000.	
Paid in Surplus, Earned Surplus	55000.	
Undivided Profits	9211.95	
National Bank Notes outstanding	246100.00	
Due to Banks	324693.76	
Individual Deposits subject to check		
Time Certificates of Deposit		
Savings Deposits Postal	65558.87	
Other Deposits	4112756.34	5063320.92
Total		
Dividends unpaid		777842.51
Notes and Bills rediscounted		100000.00
Bills Payable		594163.43
Total liabilities		

11 19. State rate of interest paid on various classes of deposits Ind. Dep. 2½ per cent—Time certif. of dep. 4 per cent—sav dep. 4 per cent—Other deposits 4 per cent.

20. Specify Town, City, County and other public or special deposits:

Depositor:	Amount Deposited:	Rate Int. Per Cent:	Surety Bond:	Amt. of Bond	Date of Expiration.

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21. Do officers and employees give Corporate Surety Bonds? Blanket Bond. Give name of Surety U. S. F. & G. Co. Expiration date.....

22. Does Bank carry Burglar Insurance? Yes.

Amount: 150,000.00 Name of Company: Nat'l Surety: Expiration 1922-1923.

23. How much past due paper are you carrying? None.

24. If a National Bank state whether you are on the Comptroller of the Currency's special list: Yes.

This Agreement made between National City Bank (hereinafter called the Depository), and the National Surety Company (Hereinafter called the Company),

Witnesseth:

Whereas, the company has executed, or is about to execute, for the Depository, the bond described in the foregoing ap-

plication, which application is hereby referred to and made a part of this Agreement:

Now, therefore, in consideration of the execution of said bond and the sum of One Dollar paid to the Depository by the Company, the Depository covenants and agrees with the Company as follows:

1. That all declarations and answers made in the foregoing application are true, and that the same are made for the purpose of inducing the Company to execute the Bond applied for without demanding collateral security from the Depository.

2. That the Depository will pay to the Company, or its duly authorized Agent, the premiums agreed in said application to be paid.

3. That the Depository will, at all times, indemnify and keep indemnified the Company and save it harmless from and against all claims, demands, liabilities, costs, charges, and expense of every kind and nature which it shall at any time sustain or incur and as well from or against all orders, judgments, and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money to meet every claim, demand, liability, cost, charge expense, suit, judgment or adjudication against it by reason of the execution of the Bond applied for and before the Company shall be required to pay thereunder.

12 4. That the Depository will immediately notify the Company at its principal offices in the City of New York, of the making of any demand or the giving of any notice or the commencement of any suit or proceeding, or the fixing of any liability which the Company may be called upon to discharge, by reason of the execution of said Bond.

5. That the Depository will, on request of the Company, procure the Company's discharge from liability under said bond, and the Company shall, at its option, have the right to the use of the Depository's name, and to all the rights and privileges of the Depository, and at any time shall have the right to be discharged from liability for the further default of the Depository and to require the Depository to account and give new surety or sureties.

6. That vouchers or other evidence of payment by the Company in discharge of any liability under said Bond shall

be prima facie evidence against the Depository of the fact and the amount of the Depository's liability to the Company.

7. That the Company shall have the right to look to and rely upon the property of the Depository and its income and earnings, and to follow and recover out of the Depository's property now belonging to it, or which may hereafter belong to it, and the income and earnings thereof, for anything due or to become due the Company under this Agreement, the execution of the said Bond by the Company being for the Depository's special benefit and protection of the Depository's property, its income and earnings.

8. That the acceptance of this agreement, and of the Depository's agreement to pay premiums for the execution of said Bond, or the acceptance at any time by the Company of other securities, shall not in any way abridge or limit the right of the Company to be subrogated to any right or remedy or limit any right or remedy which the Company might otherwise have, acquire, exercise or enforce, and the Company shall have every right and remedy which the individual surety acting without compensation would have.

9. It is understood and agreed that the Company reserves the right to decline to issue the bond for which application is hereby made, and that no claim may be made against the Company in consequence of its failure to execute such bond; nor shall any claim be made in case the bond, executed, be not accepted by or on behalf of the obligee.

In witness whereof, the Depository, by authority of its Board of Directors, or Trustees, has caused this agreement to be duly signed by its President, and Cashier or Secretary, and its corporate seal to be thereto affixed this 22nd day of December, 1920.

In Presence of

NATIONAL CITY BANK of Salt Lake City
Give Name of Bank.
By J. P. Gardner, V. President.

Attest:
Frank Pingree,
Cashier.

(Corporate Seal)

13 Exhibit "B".

"Depository Bond"

Know All Men By These Presents: That The National City Bank of Salt Lake City, Salt Lake County, Utah, as Principal and The National Surety Company, a corporation of the State of New York, as Surety, are held and firmly bound unto Edward J. Groesbeck, Treasurer of Salt Lake County, Utah, in the sum of One Hundred and Twenty Five Thousand ($125,000.00) Dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our and each of our successors and assigns, jointly and severally by these presents.

Dated the Third day of January, A. D. 1921.

Whereas, The said principal The National City Bank of Salt Lake City, has applied for a part of the funds in the treasury of the County of Salt Lake, State of Utah, to be deposited in said bank, the amount whereof shall be subject to withdrawal or diminution by said treasurer as the requirements of said County of Salt Lake shall demand, and which amount may be increased or decreased as the said treasurer may determine; and

Whereas: the said Bank, in consideration of said deposit and for the privilege of keeping the same, has agreed to pay to the said County of Salt Lake, State of Utah, interest on such sum at a rate not less than two per cent per annum, on the amount of said deposit, the same to be credited and paid monthly upon the daily average of such amount as the said bank shall have on deposit for the month, or any fraction thereof, next preceding the crediting or payment of said interest, which interest shall be computed and credited to the account of the Treasurer of Salt Lake County and shall become thenceforth a part of such deposit.

Now, Therefore, if the said The National City Bank of Salt Lake City, shall, at the beginning of each and every month
14 render to the said Edward J. Groesbeck, Treasurer, a statement, in duplicate, showing the daily balance of the County of Salt Lake's money held by it during the month next preceding, and the interest thereon, and how the same has been credited, and shall well and truly keep all said sums of money so deposited or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of the said Edward J. Groesbeck, Treasurer as aforesaid, and shall pay over the same, and any part thereof,

upon the check or written demand of the said Edward J. Groesbeck, Treasurer, and to his successor in office as shall be by him demanded, and shall calculate, credit and pay said interest as aforesaid, and shall in all respects, save and keep the said Edward J. Groesbeck, Treasurer, harmless and indemnified for and by reason of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue.

Provided, That, if the said Surety shall so elect, this bond may be cancelled at any time by giving thirty days' notice in writing to the said Treasurer, and to the persons authorized by law to approve of such bond, such notice to be accompanied by a sworn statement of all facts and setting forth the reasons in connection with such request for cancellation, and this bond shall be deemed cancelled at the expiration of said thirty days, and said Surety remaining liable for all or any acts covered by this bond which may have been committed by said The National City Bank of Salt Lake City, up to and including the date of expiration of said thirty days notice. The said surety shall, upon the surrender of this bond and its release from all liability thereunder, upon request, refund this premium paid, less a pro rata part thereof for the time this bond shall have been in force.

Signed and sealed, the day and year first above written.

THE NATIONAL CITY BANK OF SALT LAKE CITY,
By H. J. Wallace, Vice-President.

NATIONAL SURETY COMPANY,
By J. B. Moreton,
Its attorney-in-fact.

Attest:
F. M. Pingree, Cashier.

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15 Exhibit C.

Claim of National Surety Company.

In the Matter of the Receivership of National City Bank of Salt Lake City.

State of New York,
County of New York—ss.

H. J. Lofgren, being first duly sworn, deposes and says that he is an officer, to-wit, the Vice-president of the National

Surety Company, a corporation organized and existing under the laws of the State of New York with its principal place of business at New York City, in said state; that as such officer he is its agent and that he is authorized to make this Proof of Claim.

That the claimant National Surety Company was, at all times herein mentioned, and is now, engaged in the business of furnishing surety bonds, and during all such times has complied with the provisions of the constitution and laws of the State of New York and Utah, so as to entitle it to do business in each of said states.

That the National City Bank is a national banking corporation organized and existing under and by virtue of the laws of the United States and particularly under the act of Congress known as the "National Banking Act", and has its office and place of business in Salt Lake City, Utah.

That at all times herein mentioned, Edward J. Groesbeck was, and now is, County Treasurer of Salt Lake County, State of Utah; that the laws of the State of Utah, to-wit, Section 4500, requires that the County Treasurer shall, before making a deposit in any bank, require from such depository collateral security or a good and sufficient surety company bond or a personal bond approved by him and sufficient in amount to fully protect such funds.

16 That while the said National City Bank was actively engaged in the business of conducting a national bank at Salt Lake City, Utah, and prior to the 3rd day of January, 1921, the said Edward J. Groesbeck, being then and there about to deposit funds in said National City Bank, required that the said Bank furnish to him, as a condition precedent to the depositing of the funds of said County in said Bank and as a guarantee of the repayment of the same, a depository bond in the sum of $125,000.00, under the statuory provision referred to.

That the said National City Bank applied to this claimant National Surety Company for such a surety bond, and that as an inducement and the consideration for the execution of said bond by this claimant, and prior to the delivery of the same. the National Surety Company demanded and received from said National City Bank its written indemnity agreement, in which it is provided in part as follows:

"That the Depository will, at all times, indemnify and keep indemnified the Company and save it harmless from and

against all claims, demands, liabilities, costs, charges, and expense of every kind and nature which it shall at any time sustain or incur and as well from or against all orders, judgments, and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse, and make good to the Company, its successors and assigns, all sums and amounts of money to meet every claim, demand, liability, cost, charge, expense, suit, judgment or adjudication against it by reason of the execution of the Bond applied for and before the Company shall be required to pay thereunder.

"That the Depository will immediately notify the Company at its principal offices in the City of New York, of the making of any demand or the giving of any notice or the commencement of any suit or proceeding, or the fixing of any liability which the Company may be called upon to discharge, by reason of the execution of said Bond. * * * * * * * * *

"That the Company shall have the right to look to and rely upon the property of the Depository and its income and earnings, and to follow and recover out of the Depository's property now belonging to it, or which may hereafter belong to it, and the income and earnings thereof, for anything due or to become due the Company under this Agrement, the execution
of the said Bond by the Company being for the De-
17 pository's special benefit and protection of the Depository's property, its income and earnings."

That the said National Surety Company did thereafter, to-wit, on the 3rd day of January, 1921, make, execute and deliver to said Edward J. Groesbeck, as County Treasurer, and to Salt Lake County, its bond in the sum of $125,000.00, executed by the said National City Bank as principal and by the said Edward J. Groesbeck as such County Treasurer and funds were thereafter deposited by him in said National City Bank. That the said bond contained the following provision:

"Now, therefore, if the said The National City Bank of Salt Lake City, shall, at the beginning of each and every month render to the said Edward J. Groesbeck, Treasurer, a statement, in duplicate, showing the daily balance of the County of Salt Lake's money held by it during the month next preceding, and the interest thereon, and how the same has been credited, and shall well and truly keep all said sums of money so deposited or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of the said Edward J. Groesbeck, Treasurer as afore-

said, and shall pay over the same, and any part thereof, upon the check or written demand of the said Edward J. Groesbeck, Treasurer, and to his successor in office as shall be by him demanded, and shall calculate, credit and pay said interest as aforesaid, and shall in all respects, save and keep the said Edward J. Groesbeck, Treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue."

That thereafter, the said Edward J. Groesbeck, as such County Treasurer, did make deposits in said National City Bank and at the time of the failure of said Bank on the 17th day of January, 1922, had on deposit in said Bank, of the funds of said Salt Lake County, $643,094.29. That following the closing of said Bank on said day, Edward E. Jenkins was appointed as Receiver of said Bank and now is the duly appointed, qualified and acting Receiver of said Bank.

That following the failure of said Bank, the said Edward J. Groesbeck as County Treasurer, and Salt Lake County, made formal demand in writing upon this claimant to make immediate payment to it and to them of the said depos-
18 its up to the amount of said bond, to-wit, $125,000.00, and because of said demand and because of the breach of said bond by said National City Bank, this claimant was obliged to and did, on or about the 17th day of June, 1922, pay to said Edward J. Groesbeck, and Salt Lake County, the said sum of $125,000.00.

That heretofore, and subsequent to aforesaid payment, the National Surety Company duly transferred and assigned to the American Indemnity Company, a corporation, of Galveston, Texas, $5000.00 of its said claim of $125,000.00 hereinbefore set forth. From the time of said assignment continuously said National City Bank has been and still is indebted to said National Surety Company on account of the matters herein stated in the sum of $120,000.00. No further or additional assignments or transfers of any portion of said claim has been made and this claimant is the sole and exclusive owner thereof to the extent of said $120,000.00.

That no part of said debt of said National City Bank, to this claimant, arising out of said Indemnity Agreement, or otherwise or at all, has been paid, that there are no set-offs or counter-claims to the same and that no assignments have been made excepting as above set forth and that the full amount of said sum of $125,000.00 was, at the time of said

payment by this claimant as aforesaid on to-wit, June 17, 1922, and resulting therefrom and from said indemnity agreement and said bond, justly due and owing from said National City Bank to this claimant National Surety Company, and there is now justly due and owing from said National City Bank to this claimant, National Surety Company, said balance in the sum of $120,000.00 and that no part thereof has been assigned or transferred and that no part thereof has been paid and that there are no set-offs or counter-claims to the same.

That the said National Surety Company demands that its claim, as above set forth, in the sum of $120,000.00, arising out of the express promise and agreement of said National City Bank to reimburse said National Surety Company and hold it harmless be allowed and approved and that dividends, in the amount and upon the same basis as heretofore paid to other claimants in the list of common claims and also that all future dividends to be declared and made payable to said common creditors, be paid to this claimant ratably with other creditors, upon said sum of $120,000.00.

19

H. J. LOFGREN,

NATIONAL SURETY COMPANY
A. C. H.
By H. J. Lofgren, Vice-President.

Subscribed and sworn to before me this 31st day of March, 1925.

(Seal) WM. W. WEAVER,
Notary Public, Residing at New York City, N. Y.

My commission expires March 30, 1926.

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20 (Demurrer of Defendant to Complaint.)

Comes now the defendant and demurs to plaintiff's complaint on file herein, and for grounds of demurrer says:

1. That said complaint is vague and ambiguous in this, that it is not alleged therein whether the deposit made in The National City Bank by Salt Lake County or by E. J. Groesbeck, its treasurer, has been fully repaid and if so to whom it has been repaid.

2. It appears from the face of said complaint that the matters and things therein alleged have already heretofore been adjudicated in this court in an action entitled, "Salt Lake County, a subdivision of the State of Utah, E. J. Groesbeck, County Treasurer of said Salt Lake County, and American Surety Company of New York, a corporation, plaintiffs, vs. Edward E. Jenkins, as Receiver of The National City Bank of Salt Lake City, Utah, a National Banking Association, defendant, National Surety Company of New York, a corporation, American Indemnity Company, a corporation, and Massachussetts Bonding & Insurance Company, a corporation, interpleaded defendants", and the plaintiff is not entitled to have the same matters and things again reviewed.

3. That said complaint fails to state facts sufficient to constitute a cause of action against this defendant.

Wherefore, defendant prays that plaintiff's action be dismissed and that defendant be permitted to go hence
21 with his costs.

BAGLEY, JUDD & RAY
Attorneys for Defendant.

Received copy of the foregoing demurrer this 2 day of June, 1925.

ARTHUR E. MORETON
Attorneys for Plaintiff.

I, Paul H. Ray, hereby certify that I am one of the attorneys for the defendant in the above entitled action; that I have read the plaintiff's complaint on file herein and have also read the foregoing demurrer; that I verily believe that the foregoing demurrer to plaintiff's complaint on file herein, is meritorious and well taken and should be sustained.

PAUL H. RAY

Filed in United States District Court, District of Utah, Jun 2, 1925, John W. Christy, Clerk.

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22 (Order overruling Demurrer to Complaint.)

September 28, 1925.

At this 28th day of September, 1925, comes said plaintiff by A. E. Moreton, its attorney, and said defendant by Paul H. Ray, his attorney, also comes. And the demurrer of defendant to the complaint herein coming on now regularly to

be heard, the same is argued by counsel, and the Court being well advised in the premises, doth overrule said demurrer, with leave to defendant on or before October 10, 1925, to answer the complaint herein as he shall be advised.

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23 (Answer.)

Comes now the defendant, Edward E. Jenkins, as Receiver of The National City Bank of Salt Lake City, Utah, and for answer to plaintiff's complaint on file herein admits, denies and alleges:

I. Defendant admits paragraph 1 of plaintiff's complaint.

II. Defendant admits paragraph 3 of said complaint.

III. Defendant admits paragraph 4 of said complaint.

IV. Defendant denies each and every allegation in plaintiff's complaint contained not herein specifically admitted or qualified.

V. Further answering said complaint, and as a separate and additional defense thereto, this defendant alleges:

1. That prior to the failure of the National City Bank E. J. Groesbeck, as treasurer of Salt Lake County, designated said National City Bank as a depository of funds held by him as Treasurer of Salt Lake County; that as a condition for depositing such funds the said Groesbeck required the National City Bank to secure him against loss of any and all funds so deposited; that thereupon said National City Bank for the purpose of securing such funds as might be deposited by said E. J. Groesbeck, as such treasurer, delivered to said Groesbeck $360,000.00 par value of bonds of the Crystal Lake Farms Company, and in addition thereto procured and

24 delivered to said Groesbeck three certain depository surety bonds, the aggregate penalties of which amounted to the sum of $225,000.00; that one of said depository bonds in the sum of $125,000.00 so furnished by the bank to said Groesbeck as treasurer, was executed by the National Surety Company of New York, plaintiff herein, another of said depository bonds in the sum of $75,000.00 so procured by the bank and delivered to said Groesbeck as treasurer, was executed by the Fidelity and Deposit Company of Maryland; the other of said depository bonds in the amount of $25,000.00 so procured by said bank and delivered to said Groes-

beck as treasurer, was executed by the Massachusetts Bonding and Insurance Company.

2. That each and all of the said depository bonds ran to E. J. Groesbeck as treasurer of Salt Lake County, obligee.

3. That said E. J. Groesbeck as such treasurer did from time to time subsequent to the furnishing of such depository bonds and prior to the failure of said National City Bank deposit large sums of money in said bank; that the amount of money in said bank to the credit of said Groesbeck as treasurer at the time of the failure of said bank was the sum of $643,094.29.

4. That upon the failure of said bank, and on the 3rd day of February, 1922, this answering defendant was by the Comptroller of Currency of the United States duly and regularly appointed receiver of the said National City Bank and ever since said time has been and now is receiver of said bank.

5. That upon the falure of said bank and upon an inventory of its assets it became apparent that the assets of said bank were insufficient to pay the depositors of said bank including said E. J. Groesbeck as treasurer of Salt Lake County. Thereupon the said Groesbeck, as treasurer of Salt Lake County, made demand upon the National Surety Company, plaintiff herein, upon the Fidelity and Deposit Company of Maryland, and upon the Massachusetts Bonding and Insurance Company for payment to him as such treasurer of the full penalties of their depository bonds.

6. That the Fidelity and Deposit Company of Maryland paid the penalty of its bond, to-wit, $75,000.00 and thereupon demanded of said Groesbeck an assignment to it of his claim against the said National City Bank and your defendant as receiver in the sum of $75,000.00; that there was a special subrogation and assignment provision in the depository bond furnised by the said Fideity and Deposit Company of Maryland by reason of which the said E. J. Groesbeck as treasurer and this defendant as receiver recognized the right of the Fidelity and Deposit Company of Maryland to such assignment, in consequence of which this defendant issued his receiver's certificate to the Fidelity and Deposit Company of Maryland in the sum of $75,000.00, thereby reducing the claim of E. J. Groesbeck as treasurer against this defendant as receiver from the sum of $643,094.29, to the sum of $568,094.29.

7. That the National Surety Company of New York, plaintiff herein, offered to pay to E. J. Groesbeck as treasurer the full penalty of its depository bond, to-wit, $125,000.00 but demanded in consideration therefor that said Groesbeck as treasurer likewise assign to it his claim against the said bank and this defendant as its receiver in the sum of $125,000.00; that said E. J. Groesbeck as treasurer refused to accept payment upon such condition and demanded of the plaintiff herein, National Surety Company of New York, an unconditional payment of the full penalty of its depository bond; that on or about the 1st day of April, 1922, a meeting was held at the office of Arthur E. Moreton, Attorney for plaintiff, National Surety Company of New York, at which meeting said National Surety Company of New York, and the American Surety Company of New York, the Fidelity and Deposit Company of Maryland, the Massachusetts Bonding and Insurance Company and this defendant were all represented by their attorneys; that at such meeting the relative rights of all of the surety companies there represented in and to the assets of said National City Bank were discussed and it was agreed by all the parties there present, including the attorney for the plaintiff herein, National Surety Company of New York, that only the Fidelity and Deposit Company of Maryland was entitled to a pro tanto assignment of Groesbeck's claim against the bank until said Groesbeck as
26 treasurer had been made whole by funds received from the depository surety companies and from the receivership estate and the proceeds of Crystal Lake Farm bonds, or otherwise.

8. That thereupon defendant, as receiver, issued his receiver's certificate to E. J. Groesbeck as treasurer of Salt Lake County in the sum of $568,094.29, being the amount due from the defendant as receiver to said Groesbeck on account of his deposit in said bank, less the sum of $75,000.00 assigned by the said Groesbeck as treasurer to the Fidelity and Deposit Company of Maryland.

9. That thereafter during the course of the liquidation of said bank and its assets, this defendant accumulated large sums of money and was directed from time to time by the Comptroller of Currency of the United States to pay dividends to the Depositors of said bank; that on or about the 7th day of September 1922 a dividend of 20% was paid to the depositors of said bank; that the 20% paid to E. J. Groesbeck as treasurer and holder of said certificate amounted to $113,618.84; and that thereafter and on or about the 27th day of

February, 1923, this defendant issued and paid to the creditors of said banks a further dividend of 10%, and the 10% paid to said Groesbeck, holder of said certificate, amounted to $56,809.42.

10. That when said E. J. Groesbeck was elected Treasurer of Salt Lake County, Salt Lake County required that he furnish to it a surety bond in the sum of $200,000.00, conditioned upon his safely keeping and repaying to said County all moneys coming into his hands as treasurer of said County; that said Groesbeck procured the bond of the American Surety Company of New York in the sum of $200,000.00 and delivered the same to Salt Lake County; that upon the failure of said National City Bank said County made demand upon Groesbeck as treasurer for the return of all moneys which had come into his hands, and which had by him been deposited in said National City Bank; that said Groesbeck was unable to return said moneys to said Salt Lake County, whereupon said County made demand upon the American Surety Company for the full penalty of its bond; that thereafter and on or about the 15th day of February, 1924, said
27 American Surety Company paid to Salt Lake County the full amount of said bond, to-wit, the sum of $200,000.00, together with interest thereon amounting to $23,362.13.

11. That on or about the 15th day of February, 1924, by reason of the payment of dividends accruing from defendant's trust as receiver of said bank and by reason of the payment by the depository sureties before referred to of the sum of $225,000.00, and by reason of the payment of said County by the American Surety Company of the sum of $200,000.00, $595,428.28 had been repaid to Salt Lake County out of a total of $643,094.29 entrusted to said E. J. Groesbeck as treasurer and by him deposited in said National City Bank.

12. That on or about the 5th day of October, 1923, this defendant as receiver declared a dividend of 10% to all depositors of said bank, and announced his intention of paying the sum of $56,809.42, being 10% of the amount of the receiver's certificate held by Groesbeck, to said Groesbeck as treasurer of Salt Lake County. Thereupon the American Surety Company served notice upon this defendant that by reason of its obligation to pay the sum of $200,000.00 to Salt Lake County as surety upon the bond of E. J. Groesbeck as treasurer, and by reason of the fact that only $47,000.00 was required to make Salt Lake County whole on account of the

moneys entrusted to Groesbeck as treasurer, that it, said American Surety Company, was entitled to be paid the difference between $56,809.42 and $47,666.01, and said American Surety Company served further notice upon this defendant that it claimed the right to receive all further dividends accruing in the future on account of said certificate held by said E. J. Groesbeck, until such time as it, said American Surety Company, should be made whole on account of its payment of the sum of $200,000.00 and interest to Salt Lake County.

13. That at the same time said American Surety Company made said demand upon this defendant the National Surety Company of New York and the Massachusetts Bonding and Insurance Company, depository sureties as above set forth, notified this defendant that when Salt Lake County had been made whole on account of the moneys en-
28 trusted to Groesbeck as treasurer and by him deposited in the National City Bank, they, the National Surety Company of New York and the Massachusetts Bonding and Insurance Company, were entitled to receive dividends from the defenadnt as receiver before such time as the American Surety Company or E. J. Groesbeck as treasure had been made whole.

14. This defendant further alleges that upon receipt of said notice from the National Surety Company of New York and the Massachusetts Bonding & Insurance Company, he refused to pay over said dividend amounting to $56,809.42 to E. J. Groesbeck and the American Surety Company as demanded by them; that thereupon Salt Lake County, E. J. Groesbeck as treasurer of Salt Lake County, and the American Surety Company brought a suit in this court against this defendant as receiver wherein they prayed that this court required this defendant to pay over said 10% dividend as follows, to-wit: $47,666.01 to Salt Lake County and the balance of $9,143.41 to E. J. Groesbeck, treasurer, and that this court order and direct this defendant to pay all future dividends accruing on account of the deposit in the National City Bank made by said Groesbeck as treasurer until such time as said Groesbeck as treasurer and the American Surety Company as surety might be made whole.

15. That plaintiffs in said action served summons upon this defendant and thereupon this defendant filed in this court his bill of interpleader, wherein he set forth the conflicting claims of plaintiffs in said action and the National

Surety Company and the Massachusetts Bonding and Insurance Company, and the American Indemnity Company, the last named company being a reinsurer of the National Surety Company, and this defendant prayed that this court order the National Surety Company, the Massachusetts Bonding and Insurance Company and the American Indemnity Company to appear in said action and set up their claims if any to said dividend and to such dividends as might thereafter accrue.

16. This defendant alleges that pursuant to said prayer of this defendant in his bill of interpleader, this court did direct the National Surety Company, the Massa-
29 chusetts Bonding and Insurance Company and the American Indemnity Company to appear in said action and set up their claims if any to said dividend and to such other and further dividends as might thereafter accrue.

17. That the National Surety Company, the Massachusetts Bonding and Insurance Company, and the American Indemnity Company pursuant to said order of this Court, appeared in said action and filed their sworn answers and complaints in intervention; that said National Surety Company in its said complainant in intervention so filed in said action under oath alleged that it was entitled to participate in said dividends pro tanto with the American Surety Company and E. J. Groesbeck by reason of its alleged right to subrogation, and said National Surety Company in paragraph 12 of its verified answer and complaint in intervention set forth the following

"That the said National City Bank in its written application to this defendant for said depository bond in the sum of $125,000.00, and as a consideration for the issuance of said bond, promised and agreed to hold the said National Surety Company harmless, and to indemnify and reimburse it for any loss which it might sustain by reason of its execution of said bond and following its payment to Salt Lake County of the penalty of said bond in the sum of $125,000.00, the National Surety Company duly presented its claim in said amount arising out of said bond to said defendant receiver."

18. That in its prayer at the end of said answer and complainant in intervention said National Surety Company among other things prayed as follows:

"That the claim of the National Surety Company against said defendant receiver in the sum of $125,000.00 arising out of the promise and agreement of said National City Bank to indemnify and to hold said National Surety Company harmless and to reimburse it for any loss on account of its execution of said bond in the sum of $125,000.00 be allowed and approved, and the defendant receiver ordered to pay to said National Surety Company dividends thereon."

19. That upon the filing of said sworn answer and complaint in intervention, including the allegations hereinbefore referred to, the American Surety Company and E. J. Groesbeck as plaintiffs answered said complaint in intervention of said National Surety Company and denied that said National Surety Company was entitled to participate in said dividends either by reason of any alleged subrogation or by reason of any alleged right to direct indemnity; that the issue thus joined was tried before this court and a judgment entered in said action wherein it was adjudged that the National Surety Company was not entitled to participate in the assets of said Bank until said E. J. Groesbeck as treasurer and the American Surety Company as surety had been made whole, and it was further adjudged and decreed that the National Surety Company was not entitled either by reason of any alleged subrogation or by reason of any alleged right to direct indemnity to compete or participate with said Groesbeck or said American Surety Company in said dividends until such time as E J. Groesbeck as treasurer and the American Surety Company as surety had been made whole.

20. That an appeal from said judgment of the Court was taken by the National Surety Company to the Circuit Court of Appeals of the United States for the Eighth Circuit; that said matter was submitted upon printed briefs and oral arguments to the Circuit Court of Appeals of the United States for the Eighth Circuit and that in said Circuit Court of Appeals the National Surety Company did in said action insist and rely upon its right to participate by reason of its alleged right to direct indemnity; that said Circuit Court of Appeals after a hearing of said cause affirmed the judgment and decree of this court theretofore entered in said action and this defendant alleges that the claim of the plaintiff herein, National Surety Company, was in said former action fully adjudged and settled.

21. Defendant further alleges that upon the commencement of the trial of said cause the National Surety Com-

pany by its attorney of record in open court stipulated that Salt Lake County as plaintiff in that action was entitled to have and receive from Edward E. Jenkins as receiver, defendant in that action, the sum of $47,666.01 before it, the National Surety Company, was entitled to have and receive anything from said Edward E. Jenkins as receiver; that said stipulation, so made and entered in said cause, is wholly inconsistent with the claim now attempted to be set up by plaintiff in his complaint herein to the effect that
31 it was at all times entitled to direct indemnity.

22. Defendant further alleges that by reason of the acts and conduct of plaintiff as herein set out, it is now estopped and debarred from asserting that it is entitled to have or receive dividends from defendant until said E. J Groesbeck as treasurer and said American Surety Company as surety have been made whole and reimbursed in full.

23. Defendant alleges that the receiver's certificate so issued to Groesbeck as treasurer in the sum of $568,094.29 is still outstanding and a claim against this defendant; that there has been paid by this defendant on account of said certificate the sum of $340,856.52; that there has been paid to Groesbeck as treasurer on account of the indebtedness evidenced by such certificate the sum of $125,000.00 by the National Surety Company of New York, plaintiff herein, and the sum of $25,000.00 by the Massachusetts Bonding and Insurance Company; that there is still due and owing to the said Groesbeck as treasurer and the American Surety Company of New York, his surety, on account of said receiver's certificate, the sum of $227,237.77.

24. This defendant further alleges that he has been able to pay to depositors of said bank up to date only 60% of their claims; that in his best judgment he will not be able to pay more than 15% additional in dividends; that the bonds of said Crystal Lake Farms Company are worthless in defendant's opinion, and no money has been or can be realized therefrom; that he verily believes there will be a loss of about 25% to the depositors of said National City Bank; that it will require all of said 15% which defendant hopes to realize out of the remaining assets of said bank plus the entire amount of said depository bonds to make said Groesbeck as treasurer and said American Surety Company, his surety, whole on account of said deposit and said outstanding receiver's certificate.

25. Defendant alleges that in order to pay a 10% dividend to depositors it is necessary to have on hand the sum of $158,382.03; that if defendant is able to pay 15% more by way of dividends to creditors he will have to realize from the assets on hand the sum of $237,573.04; that he verily believes that he can not realize from said assets in excess of said sum; that if he is able to realize said sum he will declare a 15% dividend on account of said receiver's certificate so held by said Groesbeck as treasurer and said American Surety Company, which dividend will amount to the sum of $85,214.13; that said dividend when declared will fully pay and reimburse said Groesbeck as treasurer and said American Surety Company; that if this court should order that plaintiff herein National Surety Company, is entitled to participate pro rata in the assets of said bank, defendant alleges that the Massachusetts Bonding and Insurance Company, which company is in the same relation to this defendant and the assets of said bank as the plaintiff National Surety Company is, would also be entitled to participate in said assets of said bank and the defendant will be required at once to pay 60% of $125,000.00 or the sum of $75,000.00 to plaintiff and will be required to pay 60% of the sum of $25,000.00 or $15,000.00 to the Massachusetts Bonding and Insurance Company; that if an additional 15% is realized from the assets of said bank and plaintiff should prevail in this action, this defendant would have to include the plaintiff, National Surety Company, and the American Surety Company in his distribution of said 15% as a result of which the said Grosbeck as treasurer and the American Surety Company, as surety, would remain unpaid to the extent of $31,804.23, whereas the plaintiff, National Surety Company, and the Massachusetts Bonding & Insurance Company would be reimbursed on their said depository bonds of $125,000.00 and $25,000.00 respectively in the sums of $85,000.00 and $17,000.00 respectively; and this defendant alleges that when the plaintiff herein executed and furnished its depository bond to the said E. J. Groesbeck, as treasurer, it therein and thereby undertook and agreed to protect said Groesbeck as treasurer, against any loss on account of his deposit in said bank to the amount of the full penalty of its said bond, and that if plaintiff, National Surety Company, should be adjudged to be now entitled to participate or compete with said Groesbeck in the
33 distribution of the assets of said bank, said plaintiff would be freed from a substantial part of the obligation of its said bond, to the damage and injury of said

Groesbeck and to the damage and injury of the other depositors of said bank.

26. Defendant alleges that he is informed and believes and upon that ground alleges that said Groesbeck as treasurer has assigned and conveyed to the American Surety Company of New York the said receivership certificate for $568,094.29, above referred to, and has assigned and conveyed to said American Surety Company all his right title and interest in and to said bonds of the Crystal Lake Farms Company; that said E. J. Groesbeck as treasurer, of Salt Lake County, and the American Surety Company of New York as surety, are interested in the issues raised by plaintiff's complaint and defendant's answer, and a full and final adjudication of the issues raised thereby can not be made unless the said Groesbeck and the said American Surety Company are made parties to this action, and required to set up their claim, if any, in and to the assets of said bank, now in the possession of defendant as receiver.

Wherefore, defendant prays that an order of this court issue to E. J. Groesbeck, treasurer of Salt Lake County, and to the American Surety Company of New York, requiring said E. J. Groesbeck and said American Surety Company of New York to appear before this court and set up their claims if any to the assets of the National City Bank of Salt Lake City, Utah, now held and possessed by defendant as receiver;

That having fully answered plaintiff's complaint on file herein, this court enter its judgment and decree that plaintiff take nothing by reason of its said complaint;

Defendant prays for such other and further relief as to this court may be deemed just and equitable.

BAGLEY, JUDD & RAY,
Attorneys for Defendant.

34 State of Utah
County of Salt Lake—ss.

Edward E. Jenkins, being first duly sworn, on oath deposes and says:

That he is the receiver of the National City Bank of Salt Lake City, Utah, and the defendant in the above entitled action;

That he has read the foregoing answer, knows the contents thereof and that the same is true of his own knowledge, ex-

cept as to matters therein stated on information and belief, and as to such matters he believes it to be true.

EDWARD E. JENKINS

Subscribed in my presence and sworn to before me this 13 day of October 1925.

A. H. NEBEKER
Notary Public
(Seal) Rescidence: Salt Lake City, Uta.h

Copy of the foregoing Answer received this 15th day of October, 1925.

ARTHUR E. MORETON
Attorneys for Plaintiff.

Filed in United States District Court District of Utah Oct 15 1925 John W. Christy, Clerk.

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35 Order Interpleading American Surety Company and E. J. Groesbeck as Defendants,

Plaintiff herein having heretofore filed its verified complaint wherein it seeks to recover against the defendant a judgment for the sum of $120,000.00 and wherein it prays for a judgment of this court directing the defendant to accept and approve its claim as a creditor against the defendant, and the defendant herein having filed his verified answer wherein he sets forth certain facts wherefrom it apears that E. J. Groesbeck, as Treasurer of Salt Lake County, Utah, and the American Surety Company of New York, a corporation have an interest or claim an interest in the subject matter of the above entitled suit; and whereas defendant prays that this court make its order directing the said E. J. Groesbeck and said American Surety Company to appear in said action and set for their claim or claims, if any, to the subject matter of said action; and, whereas, defendant's demurrer to plaintiff's complaint has heretofore been presented to this court and this court has heard the statement of counsel for the parties thereon from which statement it appears to this court that E. J. Groesbeck Treasurer of Salt Lake County, and the American Surety Company should be made parties to such action,

Now, Therefore, it is hereby Ordered that E. J. Groesbeck, as Treasurer of Salt Lake County, and the American Surety Company of New York, a corporation, appear in this
36 action and set forth their claims, if any, to the property subject of said action.

It is Ordered that a certified copy of this order be served upon E. J. Groesbeck, Treasurer of Salt Lake County, and the American Surety Company of New York, a corporation, by the United States Marshal, and that within ten days after the service thereof upon each of said parties, that they appear herein pursuant to this order and set forth their claim or claims, if any, to the property the subject matter of this action.

(Signed) TILLMAN D. JOHNSN
Judge.

Dated this 17th day of October, 1925.

Filed in United States District Court, District of Utah, Oct. 17, 1925. John W. Christy, Clerk.

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37 Amended Answer of Interpleaded Defendants E. J. Groesbeck and American Surety Company.

Come now E. J. Groesbeck and the American Surety Company of New York, a corporation, interpleaded herein, and for answer to plaintiff's complaint, admit, deny and allege as follows:

I.

These interpleaded defendants admit the allegations of paragraphs 1, 3, 4 and 5 of the said complaint.

II.

Answering paragraph 2 of the said complaint, these interpleaded defendants admit that the National City Bank of Salt Lake City, Utah, was until its failure on or about the 17th day of January, 1922, a national banking association organized and existing under the national banking act, and conducting a general banking business at Salt Lake City, Utah.

III.

Answering paragraph 6 of the said complaint, these interpleaded defendants admit and allege that under the laws of the State of Utah, to-wit, Sec. 4500 Compiled Laws of Utah, 1917, a county treasurer is authorized to deposit the public funds in his custody in a bank chosen by him provided that he comply with said section which requires that he take collateral security or a good and sufficient surety company bond or personal bond approved by him sufficient in amount to protect such funds.

38 Answering paragraphs 7 and 8 of said complainant, these interpleaded defendants admit and allege that the

plaintiff, on or about the 3rd day of January, 1921, as surety, and the National City Bank of Salt Lake City as principal, executed and delivered to E. J. Groesbeck, County Treasurer of Salt Lake County, its depository bond in the sum of $125,000.00, in the form of Exhibit "B" to the complaint, in connection with and as an inducement for the deposit of County funds in said National City Bank of Salt Lake City by the said E. J. Groesbeck as County Treasurer of Salt Lake County.

V.

Answering paragraph 9 of the said complaint, these interpleaded defendants admit and allege that between the 3rd day of January, 1921, and the 17th day of January, 1922, the said E. J. Groesbeck did, from time to time, make deposits in said Bank of County funds; that on the 17th day of January, 1922, the said National City Bank of Salt Lake City closed its doors and suspended business; that after suspension of said bank certain items were charged back and the account of said E. J. Groesbeck was made to show a credit in his favor of $643,094.29; that said Groesbeck made demand upon the plaintiff for payment on account of its said bond in the sum of $125,000.00; that pursuant to said demand plaintiff paid to said E. J. Groesbeck as County Treasurer, the sum of $125,000.00, the penalty of its said bond.

VI.

Answering paragraph 10 of said complainant, there interpleaded defendants admit that said National Surety Company has assigned to the American Indemnity Company, a corporation of Galveston, Texas, $5000.00 of its alleged claim.

VII.

Answering paragraph 11 of said complainant, these interpleaded defendants admit that plaintiff filed with the Receiver of said National City Bank of Salt Lake City, an alleged claim, shown as Exhibit "C" to the complaint, based on its said indemnity agreement, but as to whether said claim was in proper form, or was filed in time, these defendants are not informed; these defendants admit that the said
39 Receiver has refused to pay to the plaintiff dividends on said alleged claim.

VIII.

Answering paragraph 12 of said complainant, these interpleaded defendants deny each and every allegation therein contained.

IX.

These interpleaded defendants deny each and every allegation in the said complaint contained not hereinbefore specifically admitted, denied or qualified.

Further answering the said complaint and by way of an affirmative defense thereto, these interpleaded defendants allege:

That on, to-wit, the 10th day of March, A. D. 1924, Salt Lake County, a subdivision of the State of Utah, E. J. Groesbeck, County Treasurer of Salt Lake County, and the American Surety Company of New York, as plaintiffs, instituted a suit in the above entitled court against Edward E. Jenkins, as Receiver of the National City Bank at Salt Lake City, Utah, a national banking association, for the purpose of compelling payment by the said Receiver to said Salt Lake County and E. J. Groesbeck, and his official surety, the American Surety Company of New York, of a dividend of ten per cent amounting to the su mof $56,809.42, and compelling said Receiver to pay all future dividends accruing on account of the deposit of County funds in the National City Bank of Salt Lake City, Utah, to the said Groesbeck as County Treasurer, until the said Groesbeck and his indemnified official surety, the American Surety Company of New York might be made whole; that in said action the National Surety Company, and the Massachusetes Bonding & Insurance Company were made parties by interpleader, and the plaintiff herein and said Massachusetts Bonding & Insurance Company appeared in said action and filed their sworn answers and complaint in intervention, and in its said answer and complaint in intervention the plaintiff herein set up the right to indemnity and reimbursement from said bank on account of the payment of the penalty of its bond in the sum of $125,000.00, which right is again asserted in this action, alleging that it had
40 duly presented its claim in said amount arising out of the payment of said bond, to the Receiver of said bank, and by its said answer and complaint prayed that its said claim against the Receiver of said bank in the sum of $125,000.00 arising out of the agreement of said bank to indemnify and reimburse it should be allowed and approved and that the defendant Receiver should be ordered to pay dividends thereon; that these interpleaded defendants answered said complainant in intervention and denied the right of said National Surety Company to participate in dividends either by way of subrogation or by reason of any alleged indemnity agree-

ment,, and the issue thus joined was presented to this Court; that on, to-wit, the 10th day of June, 1924, after trial on the merits of said issue, the above outlined court rendered judgment and decree in favor of the American Surety Company of New York in which it was decided and adjudged that said National Surety Company was not entitled to participate in the assets of said Bank until the American Surety Company of New York shall have received on account of dividends and /or proceeds of the Crystal Lake bonds, the total sum of $223,362.15, with interest on the principal sum of $200,000.00, and denied the identical claim now asserted by the plaintiff herein for reimbursement on account of said indemnity agreement; that thereafter the said National Surety Company, plaintiff herein, appealed from said judgment to the Circuit Court of Appeals of the United States for the Eighth Circuit; that it assigned error for failure of this Court to enter judgment in its behalf on the issue of its right to indemnity and reimbursement by reason of the alleged indemnity agreement sued upon in the present action; that it presented its argument in its printed brief to the said Circuit Court of Appeals on said point; that after decision of the said Circuit Court of Appeals upholding the judgment of the above entitled court, it again presented argument by way of motion for rehearing primarily on the issue of its right to indemnity and reimbursement by reason of the said application and indemnity agreement sued upon in the above entitled action that thereafter by way of petition for writ of certiorari to the United States Supreme Court, it again presented as its primary argument for such writ the issue of its right
41 to indemnity and reimbursement by reason of the application and indemnity agreement sued upon in the above entitled action; that its said petition for writ of certiorari to the United States Supreme Court was denied on the 27th day of October, 1925, and thereby the decision of the United States Circuit Court of Appeals for the Eighth Circuit affirming the decree of the above entitled court, and said decree, became and is final; that the issue sought to be again raised by the plaintiff in the above entitled action is res adjudicata; that said affirmed and final decree of this court in said cause of action between these parties is a conclusive bar to the present suit based on the same cause of action.

And by way of further answer and as a further defense, these interpleaded defendants further allege:

That when the said E. J. Groesbeck selected said National City Bank of Salt Lake City, Utah, in which to deposit County funds coming into his hands, he secured from said Bank a bond wherein it was principal and the National Surety Company was surety, whereby the Bank and its surety agreed in all respects to save and keep the said E. J. Groesbeck harmless and indemnified for and by reason of making said deposits; that nevertheless upon the failure of said Bank the American Surety Company of New York, surety on the official bond of said E. J. Groesbeck, was compelled to and did pay to Salt Lake County on account of the failure of said Bank and its inability to pay over County funds, the sum of $223,362.15; that the dividends already paid and to be paid on account of the deposit of E. J. Groesbeck as County Treasurer in said Bank and the other collateral security in the form of Crystal Lake bonds held by the American Surety Company of New York as assignee of said E. J. Groesbeck, will not be sufficient to fully reimburse said E. J. Groesbeck and his surety the American Surety Company of New York for the aforesaid payment; and that in any event these interpleaded defendants will sustain a loss by virtue of said deposit and the aforesaid payment made on the official bond; that to allow the claim of the said National Surety Company herein sued upon, would in effect increase the amount of such loss on the part of the said E. J. Groesbeck and the
42 American Surety Company of New York; that this Court and the Circuit Court of Appeals, by its affirmance of the decree heretofore rendered by this Court, have decided and determined conclusively as between all parties to this suit, that the National Surety Company is not entitled to receive any moneys or collateral from said Bank by way of subrogation or reimbursement or otherwise until its obligee E. J. Groesbeck and his assignee the American Surety Company of New York have been made whole; that the plaintiff herein is and ought to be estopped by reason of said former trial and litigation of this same issue and the decree of this Court and the affirmance of the Circuit Court of Appeals of the Eighth Circuit and by reason of its aforesaid contract of indemnity and guaranty to said E. J. Groesbeck from further prosecuting this case and from attempting to secure a part of the assets of said Bank at the expense of and to the detriment of its obligee and his assignee, before these interpleaded defendants have been made whole, by reason of said alleged indemnity agreement between plaintiff and the National City Bank of Salt Lake City to which agreement these interpleaded defendants were neither parties nor privies, and with

respect to whom said alleged indemnity agreement has no binding force or effect.

Wherefore: These interpleaded defendants pray that plaintiff may take nothing by reason of its complaint herein and that these defendants may be dismissed hence with their costs herein incurred, and for such other and further relief as may be proper.

CHENEY, JENSEN, MARTINEAU & STEPHENS,
Attorneys for E. J. Groesbeck and the American Surety Company of New York.

43 State of Utah,
County of Salt Lake—ss.

W. E. McKell being first duly sworn, deposes and says: That he is an officer of the Interpleaded defendant American Surety Company of New York, to-wit, its Resident Vice-President, and makes this verification for and on behalf of said corporation; that he has read the foregoing Amended Answer of Interpleaded defendants and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated upon information and belief, and as to such matters he believes it to be true.

W. E. McKELL.

Subscribed and sworn to before me this 1st day of December, 1925.

(Seal) ROSE SMITHEN,
Notary Public,
Residing at Salt Lake City, Utah.

Service of foregoing answer acknowledged this 1st day of December, 1925.

ARTHUR E. MORETON,
Atty. for Plaintiff.

BAGLEY, JUDD & RAY,
Attorneys for Def. Edward E. Jenkins.

Filed December 2, 1925, John W. Christy, Clerk.

44 **Plaintiff's Reply to Answer of Defendant Edward E. Jenkins**

Comes now the plaintiff National Surety Company, a corporation, and without waiving its Motion made herein to strike certain portions of the answer of the defendant Edward E. Jenkins, receiver, for its reply to the so-called separate and [addition] defense in said answer of the defendant Edward E. Jenkins, as receiver, admits, denies and alleges as follows:

1. Replying to paragraph 1 thereof, this plaintiff admits that the said National City Bank was designated as a depository of the funds of Salt Lake County and that thereafter the National City Bank procured and delivered to E. J. Groesbeck, as the Treasurer and representative of Salt Lake County, three depository surety bonds mentioned in said paragraph, and that said depository bonds, together with $360,000.00 par value of bonds of the Crystal Lake Farms Company, were delivered to said E. J. Groesbeck, treasurer, as the representative of Salt Lake County, pursuant to the provisions of Section 4500, of the Compiled Laws of Utah,
45 1917, which Section provides that if a public officer shall deposit public funds in any bank, he shall take from such depository good and sufficient collateral or surety bonds sufficient to fully protect the public funds so deposited by him.

2. Answering paragraph 2 thereof, this plaintiff admits and alleges that said depository bonds ran to E. J. Groesbeck "as treasurer of Salt Lake County" and were made to him as the agent and representative of said county and for the purpose of protecting the funds of said county so deposited by him and not otherwise.

3. Admits paragraph 3 thereof.

4. Admits paragraph 4 thereof.

5. Admits that upon the failure of said bank, that it became apparent that the assets of said bank were insufficient to pay the depositors, including the said deposit of Salt Lake County, in the sum of $643,094.29. Admits that demand was made upon the three surety companies executing said depository surety bonds, for the full penalties of their respective depository bonds, but alleges that said demand was made by Salt Lake County.

6. Admits that there was in the bond furnished by the Fidelity & Deposit Company of Maryland in the sum of $75,-

000.00, a special subrogation and assignment provision and that by reason thereof, Salt Lake County and the said defendant E. E. Jenkins as receiver, recognized the right of the Fidelity & Deposit Company of Maryland to such assignment and that thereupon Salt Lake County executed and delivered to said Fidelity & Deposit Company an assignment to $75,000.00 of said deposit, thereby reducing the claim of Salt Lake County against said defendant as receiver from the sum of $643,094.29 to the sum of $568,094.29. Further answering said paragraph, this plaintiff denies each and every other allegation therein contained.

7. Answering paragraph 7 thereof, this plaintiff alleges that it offered to pay to Salt Lake County the full penalty of its depository bond, to-wit, $125,000.00, and offered its check in said amount, upon condition that it be subrogated to the said county's claim upon said deposit to the amount of
46 said payment, but that Salt Lake County refused to accept said payment upon such condition and thereafter, on June 5, 1922, this plaintiff made payment of the same, pursuant to a resolution passed on or about June 5, 1922 by the Board of Commissioners of Salt Lake County, to the effect that said payment was received without prejudice to the claim of this plaintiff to subrogation pro tanto to the rights of said Salt Lake County against said National City Bank and its receiver. Further answering said paragraph, this plaintiff admits and alleges that sometime prior to April 1, 1922, a meeting was held at the office of Arthur E. Moreton, who was then and there acting in the capacity of attorney for Salt Lake County, at which meeting attorneys for the Fidelity & Deposit Company, American Surety Company, Massachusetts Bonding & Insurance Company and for the defendant receiver were present, and that at such meeting the relative rights of all the said surety companies there represented in and to the dividends on the deposit of Salt Lake County, were discussed informally and that at such meeting it was the [concensus] of opinion of the attorneys present that only the Fidelity & Deposit Company of Maryland was entitled to a pro tanto assignment of the claim of Salt Lake County against said bank and its receiver on account of said deposit, until said county had first been made whole by funds received from the depository surety companies and from the receivership estate and the proceeds of the Crystal Lake Farm Company bonds. That said National Surety Company, plaintiff herein, was not represented at said meeting. That said Arthur E . Moreton advised the Board of County

Commissioners of Salt Lake County of his said opinion in said matter and thereafter the said Board of County Commissioners, upon receipt of said sum of $75,000.00 from said Fidelity & Deposit Company of Maryland, made, executed and delivered to the latter its assignment of $75,000.00 of its said deposit, as aforesaid. Further answering said paragraph, this defendant denies each and every other allegation therein contained.

47 8. The plaintiff alleges that it has no knowledge or information sufficient to enable it to form a belief as to the allegations contained in paragraph 8, and therefore and upon that ground denies the same. Further answering said paragraph, this plaintiff alleges that if the said defendant receiver did issue his receiver's certificate to E. J. Groesbeck personally in the sum of $568,094.29, the same was and is wrongful, unlawful and void in violation of the rights of this plaintiff and that the said certificate should have been issued to Salt Lake County and should now be surrendered to and delivered up by said Groesbeck to the defendant receiver.

9. Admits the allegations of paragraph 9 thereof.

10. Admits the allegations of paragraph 10, and alleges that said bond further provided that the said Groesbeck would perform the duties of said office according to law.

11. Answering paragraph 11 thereof, this plaintiff admits that by reason of the payment by the three depository surety companies of the sum of $225,000.00, including the $125,000.00 paid by this plaintiff, and the payment to said County by the American Surety Company of $200,000.00, and dividends paid by said receiver, that said Salt Lake County has been repaid in full on account of its deposit in said bank. Further answering said paragraph, this plaintiff denies each and every other allegation therein contained.

12. Admits paragraph 12 thereof.

13. Admits paragraph 13 thereof.

14. Admits that the suit was brought by the American Surety Company and E. J. Groesbeck as alleged in paragraph 14 thereof.

15. Admits the allegations of paragraph 15 thereof.

16. Admits the allegations of paragraph 16 thereof.

17. Admits the allegations of paragraph 17 thereof.

18. Admits the allegations of paragraph 18, and alleges that in the prayer of its said answer in said prior action, this plaintiff National Surety Company prayed that it be
48 decreed that it be entitled by subrogation to its pro rata share of dividends then declared and held by the said defendant receiver, together with its pro rata share of all dividends thereafter declared, and that it have such other and further relief as might be just and equitable. Further answering said paragraph, this plaintiff alleges that said action referred to was instituted for the recovery of all the dividends accruing in the hands of said defendant receiver on the said deposit of Salt Lake County, that the subject matter of said action was said dividends and, as incidentally and collaterally bearing upon the rights of this plaintiff, National Surety Company, to subrogation and to priority in the distribution of said dividends upon said deposit, and to show the relation existing between it and the bank, there was offered by the National Surety Company and received in evidence, the said application for said bond and Indemnity Agreement herein sued upon. That at the trial of said case all the parties thereto agreed that there be paid to Salt Lake County the sum of $47,666.01 to make it whole, and thereupon it was stated to the Court by the attorneys for all the parties to said action, including the defendant receiver, E. J. Groesbeck and American Surety Company, that said action resolved itself solely into a contest between the surrety companies as to their respective rights to subrogation to the said dividends by reason of the payments made by each of them. The said action was thereupon, by consent of all the parties, transferred from the Law side of the court to the Equity side, and was tried as an equitable action, the subject matter thereof being solely the said dividends on said deposit. Thereupon it was stated by the Court at the trial of said action, that the said action was purely a contest between the surety companies as to priority in the payment of dividends by said receiver upon said deposit, to which statement all parties agreed, and said case was tried upon said theory, this plaintiff National Surety Company thereby striking from its answer, in effect, any claim against said receiver in said action for reimbursement based upon
49 said Indemnity Agreement. That the Court in said action, and all parties to said action, recognized the fact that said action was in fact one in rem concerning the disposition of the dividends in the receiver's hands and thereafter to accrue on said deposit, and no claim of any kind whatsoever was made or asserted by this plaintiff at said trial against said defendant receiver upon said In-

demnity Agreement herein sued upon, and that because of said statements to the court, hereinbefore referred to, and the limitations placed upon the subject matter of said action, the attorney for the said defendant receiver left the court room prior to the conclusion and final submission of said case, and the sole issue involved, to-wit, the respective rights of the surety companies to priority to said dividends, was argued by their respective counsel and the case was thereupon submitted to the court upon said issue.

19. Denies each and every allegation contained in paragraph 19 thereof. Further answering said paragraph, this plaintiff alleges that the only issue before said court in said action was the respective rights of the said surety companies to subrogation in and to the dividends upon said deposit, and that by said decree it was adjudged and decreed that this plaintiff National Surety Company was not entitled to be subrogated to the rights of Edward J. Groesbeck as treasurer of Salt Lake County to dividends on said deposit until the said American Surety Company should have received on account of said dividends and/or proceeds of the Crystal Lake Farm Company bonds, the sum of $223,362.15 with interest at the rate of eight per cent per annum on $200,000.00 thereof from February 29, 1924.

20. Answering paragraph 20 thereof, this plaintiff admits that it took an appeal from the judgment of the above entitled court to the Circuit Court of Appeals of the United States for the Eighth Circuit, and that said Circuit Court of Appeals affirmed the said judgment and decree of this court therefore entered in said action. Further answering said paragraph, this plaintiff denies each and every other allegation therein contained.

50 21. Answering paragraph 21 thereof, this plaintiff admits that in said action it stipulated that Salt Lake County was entitled to have and receive from Edward E. Jenkins as receiver, the sum of $47,666.01 of said dividend before it, the said plaintiff, was entitled to subrogation to the dividends declared or to be thereafter paid upon said deposit by said defendant receiver. Further answering said paragraph, this plaintiff denies each and every other allegation therein contained. Further answering said paragraph, this plaintiff alleges that said action was instituted by the said American Surety Company and E. J. Groesbeck for the purpose of obtaining a decree to the effect that they had a prior or preferential right to subrogation to the dividends then in the defendant receiver's hands and thereafter to be

declared by him; that the subject matter of said action was said dividends and that upon the request of the said defendant receiver, the Court issued its order requiring this plaintiff to appear and set forth its claim to dividends upon said deposit. That such an order was made and this plaintiff filed its answer, setting forth its claim for subrogation and claiming a right to priority over said American Surety Company in the distribution of said dividends, and, as incidentally and collaterally bearing upon its rights to subrogation to said dividends, it set forth in said answer the Indemnity agreement herein sued upon. This plaintiff further alleges that in said action no issue was joined between the plaintiff National Surety Company and said defendant or either of them, upon the right of this plaintiff National Surety Company to have its claim against said receiver, arising out of said Indemnity Agreement, allowed and approved and the receiver directed to pay dividends thereon; that the parties hereto stated to the court that the sole and only question in issue was the respective rights of the American Surety Company, National Surety Company and Massachusetts Bonding & Insurance Company to priority in the distribution of said dividends, and said case was tried and determined by the Court upon said issues and said theory; that the decree
51 made and entered by this court in said action. adjudicated only the respective rights of the several surety companies hereinbefore mentioned to priority in the distribution of dividends upon said deposit of the funds of Salt Lake County made by E. J. Groesbeck as aforesaid, and those rights only.

22. Denies each and every allegation contained in paragraph 22 thereof.

23. Answering paragraph 23 thereof, this plaintiff alleges that if the said defendant receiver issued to said Groesbeck as treasurer a receiver's certificate in the sum of $568,094.29 or any other sum, the same was issued wrongfully and unlawfully and without authority of law and the same is void and should be surrendered up by said Groesbeck to said defendant receiver for cancellation, and admits that the said National Surety Company has paid to Salt Lake County on account of said deposit the full penalty of its bond in the sum of $125,000.00, as alleged in its complaint herein. Further answering said paragraph, this plaintiff denies each and every other allegation therein contained.

24. This plaintiff alleges that it has no knowledge or information sufficient to enable it to form a belief as to the

truth of the allegations contained in paragraph 24 of said answer, and therefore and upon that ground denies each and every allegation therein contained.

25. Answering paragraph 25 thereof, this plaintiff admits and alleges that it executed its depository bond as alleged in its complaint herein and thereby undertook and agreed to protect and indemnify Salt Lake County against the loss of its funds deposited in said National City Bank to the amount of the penalty of its said bond, to-wit, the sum of $125,000.00, upon the express condition that the said treasurer would require the said National City Bank, if more than the sum of $125,000.00 was deposited in said bank, to furnish additional corporate surety bonds or collateral in an amount fully sufficient to protect the funds so de-
52 posited, as provided by Section 4500 Compiled Laws of Utah 1917. That the said Treasurer Groesbeck deposited in said National City Bank more than the sum of $125,000.00 and had in said bank at the time of its failure, $643,094.29, and as security from the said bank, had received from it only the sum of $225,000.00 in corporate surety bonds and $360,000.00 par value of Crystal Lake Farm Company bonds, which bonds were and are wholly insufficient to protect the funds of Salt Lake County so deposited by said treasurer, and that as a result thereof, the said E. J. Groesbeck and the surety on his official bond, the said American Surety Company, were obliged to pay to Salt Lake County the penalty upon the official bond of said treasurer in the sum of $200,000.00. That had the said Groesbeck required and taken from said bank sufficient protection to fully protect the said deposit, as provided by said Section 4500 Compiled Laws of Utah 1917, neither he nor his surety would have snffered any loss on account of said deposit. Further answering said paragraph, this plaintiff alleges that it has no information or knowledge sufficient to enable it to form a belief as to the truth of the other allegations contained in said paragraph, and therefore and upon that ground denies each and every other allegation therein contained.

26. Answering paragraph 26 of said answer, this plaintiff denies each and every allegation therein contained.

27. Further replying to the so-called separate and additional defense contained in said answer, this plaintiff denies generally and specifically each and every other allegation therein contained.

Wherefore, the plaintiff prays for judgment as set forth in its complaint herein.

A. E. MORETON
Attorney for Plaintiff.

53 State of Utah,
County of Salt Lake—ss.

Arthur E. Moreton, being first duly sworn on oath, deposes and says that he is the attorney for the National Surety Company, the Plaintiff in the above entitled action; that he has read the foregoing reply to the answer of the defendant receiver, knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to such matters he believes it to be true. This affidavit is made by affiant for the reason that there are at this time no general officers of the said National Surety Company within the State of Utah, nor is there within the said State of Utah any agent of said National Surety Company as familiar with the facts set forth in said reply as is this affiant.

ARTHUR E. MORETON.

Subscribed and sworn to before me this 30th day of November, 1925.

RAY VAN COTT
(Seal) Notary Public
Residing at Salt Lake City, Utah.

My Commission expires March 12, 1927.

Service admitted and copy received of the foregoing reply this 30th day of Novmber, 1925.

BAGLEY, JUDD & RAY
Attorney for Defendant

E. E. JENKINS,
Receiver.

CHENEY, JENSEN, MARTINEAU & STEPHENS,
Attorneys for American Surety Company and E. J. Groesbeck.

Filed in United States District Court, District of Utah, Dec. 2, 1925, John W. Christy, Clerk.

54 Plaintiff's Motion To Strike From Answer of E. J. Groesbeck and American Surety Company

Comes now the plaintiff, National Surety Company, and moves to strike from the answer of E. J. Groesbeck and American Surety Company of New York, interpleaded defendants herein all that portion of the said answer beginning on the 11th line from the bottom of page five thereof, with the words "That the dividends already paid" and ending with the conclusion of said paragraph, for the reason that the matters and things therein set forth are material, sham and frivolous and argumentative.

A. E. MORETON,
Attorney for plaintiff.

Copy received this 30th day of November, 1925.

CHENEY, JENSEN, MARTINEAU & STEPHENS,
Attorneys for defendants, E. J. Groesbeck and American Surety Company.

Filed in United States District Court, District of Utah. Dec. 2, 1925, John W. Christy, Clerk.

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55 Plaintiff's Motion to Strike From Answer of Defendant Receiver.

Comes now the plaintiff, National Surety Company, and moves to strike from the answer of the defendant receiver, the following portions of said answer, to-wit:

1. Paragraph 23 thereof.
2. Paragraph 24 thereof.
3. Paragraph 25 thereof.

for the reason that the matters and things therein set forth are immaterial, sham and frivolous and argumentative.

A. E. MORETON,
Attorney for Plaintiff.

Copy received this 30th day of November, 1925.

BAGLEY, JUDD & RAY
Attorney for Defendant

E. E. JENKINS,
Receiver.

Filed in United States District Court of Utah Dec. 2, 1925, John W. Christy, Clerk.

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56 Plaintiff's Reply to Answer of Interpleaded Defendants American Surety Company and E. J. Groesbeck.

Comes now the plaintiff National Surety Company, a corporation, and, without waiving its Motion made herein to strike certain portions of the answer of the American Surety Company and E. J. Groesbeck, for its reply to the so-called affirmative defense in said answer of E. J. Groeebeck, and American Surety Company of New York, a corporation, defendants interpleaded herein, admits, denies and alleges as follows:

1. Admits that on or about the 10th day of March, 1924, Salt Lake County, a subdivision of the State of Utah, E. J. Groesbeck, County Treasurer of Salt Lake County, and the American Surety Company of New York, as plaintiffs, instituted a suit in the above entitled court against Edward E. Jenkins as Receiver of the National City Bank of Salt Lake City, a National Banking Association, for the purpose of compelling payment by the said Receiver to Salt Lake County and E. J. Groesbeck and his official surety, the
57 American Surety Company of New York, of a dividend of ten per cent amounting to the sum of $56,809.42 and for the further purpose of compelling said receiver to pay all future dividends accruing on account of the deposit of county funds in the National City Bank of Salt Lake City, Utah, to the said Groesbeck as county treasurer.

2. Plaintiff alleges that the said E. E. Jenkins, receiver of said bank, defendant in said action and defendant in this action, tendered said dividend of $56,809.42 into the above entitled court and in his answer prayed that the said court make its order requiring this plaintiff, National Surety Company, to appear and set forth its right to said dividend of $56,809.42 and such future dividends as might ac-

crue and come into his possession by reason of the said deposit by Salt Lake County of said funds in said National City Bank.

3. Admits that in said action the National Surety Company and the Massachusetts Bonding & Insurance Company were made parties defendant by order of interpleader of the above entitled court, of date March 28, 1924, and by such order were directed by the above entitled court to show cause, if any they had, why the said dividend of $56,809.42 should not be forthwith paid to said plaintiffs.

4. That pursuant to said order of interpleader, this plaintiff, National Surety Company, filed an answer in said action above mentioned, setting forth its claim for subrogation to its pro rata share of the said dividend of $56,809.42 then declared in the hands of said defendant receiver, together with its pro rata share of all dividends to be thereafter declared by the said receiver. That in its said answer in said action, this plaintiff National Surety Company claimed a right to priority over said American surety Company in the distribution of the dividends in the hands of and to be hereafter paid by the receiver of said bank, and as incidentally and collaterally bearing upon its right to subrogation to said dividends, it set forth in said answer the said Indemnity Agreement herein sued upon. This plaintiff further alleges that in said action no issue was joined
58 or tried between this plaintiff National Surety Company and said defendant receiver upon the rights of this plaintiff National Surety Company to have its claim against said receiver, arising out of said Indemnity Agreement, allowed and approved and the receiver directed to pay dividends thereon, and that the sole and only question before the above entitled court in said other action, and the sole and only question that was there in issue or therein adjudicated, were the respective claims of the surety companies to priority in the said dividend of $56,809.42 and further dividends to accrue in the hands of said defendant receiver on account of said deposit.

5. That the subject matter of said action was said dividends, and as incidentally and collaterally bearing upon the rights of this plaintiff National Surety Company to priority in the distribution of said dividends upon said deposit, and to show the relation existing between it and the bank, there was offered by the National Surety Company and re-

ceived in evidence, the said application for said bond and Indemnity Agreement herein sued upon. That at the trial of said case all the parties thereto agreed that there be paid to Salt Lake County the sum of $47,666.01 from said dividend to make it whole, and thereupon it was stated to the Court by the attorneys for all the parties to said action, including the defendant receiver, E. J. Groesbeck and American Surety Company, that said action resolved itself solely into a contest between the surety companies as to their respective rights to subrogation to the said dividends by reason of the payments made by each of them. The said action was thereupon, by consent of all the parties, transferred from the Law side of the court to the Equity side, and was tried as an equitable action, the subject matter thereof being solely the said dividends on said deposit. Thereupon it was stated by the Court at the trial of said action, that the said action was purely a contest between the surety companies as to priority in the payment of dividends by said receiver upon said deposit, to which statement all parties agreed, and said case was tried upon said
59 theory, this plaintiff National Surety Company. thereby striking from its answer, in effect, any claim against said receiver in said action for reimbursement based upon said Indemnity Agreement. That the Court in said action, and all parties to said action, recognized the fact that said action was in fact one in rem concerning the disposition of the dividends in the receiver's hands and thereafter to accrue on said deposit, and no claim of any kind whatsoever was made or asserted by this plaintiff at said trial against said defendant receiver upon said Indemnity Agreement herein sued upon, and that because of said statements to the court, hereinbefore referred to, and the limitations placed upon the subject matter of said action, the attorney for the said defendant receiver left the court room prior to the conclusion and final submission of said case, and the sole issue involved, to-wit, the respective rights of the surety companies to priority to said dividends, was argued by their respective counsel and the case was thereupon submitted to the court upon said issue.

6. Further replying to said affirmative matter in said answer, this plaintiff National Surety Company admits that on the 10th day of June, 1924, the above entitled court made and rendered its judgment and decree in said action above referred to in favor of the American Surety Company of New York, in which it was decided and adjudged that the National

Surety Company was not entitled to participate in the said dividends declared and to be declared by the said Receiver on the said deposit of Salt Lake County, and/or proceeds of the Crystal Lake Farms Company bonds, until the American Surety Company schould have received the sum of $323,362-15, with interest on the principal sum of $200,000.00; and that thereafter the National Surety Company appealed from said judgment to the Circuit Court of Appeals of the United States for the Eighth Circuit and that the decision of the above entitled court with reference to the right of the American Surety Company to be first repaid in full from the dividends on said deposit and/or the proceeds of the Crystal Lake Farm Company Bonds, was upheld by said Circuit
60 Court of Appeals and that said decree thereafter became and is final. Plaintiff further admits that it filed a Petition for Writ of Certiorari in the Supreme Court of the United States, praying that the decision in the said Circuit Court of Appeals be reviewed, and that said petition was denied.

7. Further replying to the so-called affirmative defense set forth in said answer of said interleaded defendant, this plaintiff denies that the issue now before the court was decided in said action above referred to and denies that the issues herein raised are res judicata by reason thereof.

8. Further replying to the so-called affirmative defense set forth i nsaid answer of said interpleaded defendants, this plaintiff denies generally and specifically each and every other allegation therein contained not hereinbefore specifically admitted, qualified or denied.

Wherefore, plaintiff prays for judgment against said defendant receiver as set forth in its complaint herein.

A. E. MORETON
Attorney for Plaintiff.

Filed in United States District Court District of Utah, Dec. 2 1925 ....., Clerk.

61 State of Utah,
County of Salt Lake——ss.

Arthur E. Moreton, being first duly sworn on oath, deposes and says that he is the attorney for the National Surety Company, the plaintiff in the above entitled action; that he has read the foregoing reply to the answer of defendants American Surety Company and E. J. Groesbeck, knows the

contents thereof and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to such matters he believes it to be true. This affidavit is made by affiant for the reason that there are at this time no general officers of the said National Surety Company within the State of Utah, nor is there within the said State of Utah any agent of said National Surety Company as familiar with the facts set forth in said reply as is this affiant.

ARTHUR E. MORETON

Subscribed and sworn to before me this 30th day of November, 1925.

RAY VAN COTT
Notary Public
(Seal) Residing at Salt Lake City, Utah,

My Commission expires: March 12, 1927.

Service admitted and copy received of the foregoing reply this 30th day of November, 1925.

BAGLEY, JUDD & RAY
Attorney for Defendant
E. E. Jenkins, Receiver.

CHENEY, JENSEN, MARTINEAU & STEPHENS
Attorneys for American Surety Company and E. J. Groesbeck.

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62 (Order granting leave to Interpleaded Defendants to file Answer to Complaint, etc.)

December 2, 1925.

At this 2nd day of December, 1925, comes said plaintiff by A. E. Moreton, its attorney, and the said defendants by Paul H. Ray, and John Jensen, their attorneys, also come. And this cause coming on regularly for trial, by the Court, a jury having been waived in writing, on motion of the defendants, E. J. Groesbeck and American Surety Company, they are given leave to file their amended answer to the complaint, it being stipulated that the reply of plaintiff now on file shall

stand as reply to said amended answer. And Fred A. Moreton is sworn and examined as a witness, and certain documentary evidence admitted on the part of plaintiff, and plaintiff rests. And the motions of plaintiff filed herein to strike are submitted and by the Court denied. And on the part of defendants, Edward E. Jenkins, W. E. McKell and E. J. Groesbeck are sworn and examined as witnesses and certain documentary evidence admitted on the part of the defendants and both parties rest. And the court having heard the evidence adduced as well on the part of defendants as the plaintiff, thereupon followed the arguments of counsel, which were continued to the hour of adjournment, when the further trial of this cause is continued until the incoming of this Court on tomorrow morning.

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63 Amendment to Plaintiff's Reply to Answer of Defendant Edward E. Jenkins, Receiver.

Comes now the plaintiff National Surety Company and by leave of court first had and obtained, and without waiving its Motion to Strike herein, amends its Reply to the answer of the defendant receiver herein, by adding to the same the following paragraph:

25A. That the said defendants and each of them are, by reason of the failure of the defendant Edward J. Groesbeck to comply with Section 4500 Compiled Laws of Utah, 1917, to take good and sufficient security to fully protect the funds of Salt Lake County so deposited by him, and the failure of the bank to give such security, barred and estopped from asserting that this plaintiff is not entitled to have the claim herein sued upon allowed and approved as a claim against said defendant receiver and that dividends be paid thereon to this plaintiff on the same basis as to all other common creditors of the bank. The plaintiff further alleges that the said National City Bank having accepted the benefit derived from the surety bond furnished by this plaintiff in its behalf, and the said interpleaded defendants, American Surety Company and E. J. Groesbeck having received and accepted

64 the benefits derived from the said surety bond furnished by the National Surety Company and the payment thereunder of the sum of $125,000.00, cannot escape from the burden connected therewith or the obligation assumed by said bank in securing said bond, and that the said defendants and each of them are, by reason thereof, barred and estopped from asserting and claiming that the claim of the

plaintiff herein sued upon should not be allowed and approved and dividends thereon be paid to it upon the same basis as to other common creditors of the bank.

A. E. MORETON
Attorney for Plaintiff.

Filed Decr. 3, 1925, by leave of Court.

JOHN W. CHRISTY, Clerk.

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65 Order Transferring Case from Law to Equity Side.

At this 3rd day of December, 1925, come again said parties by their respective attorneys, and the trial of this cause is resumed. And it is ordered nunc pro tunc as of December 2nd, 1925, this cause be transferred from the law to the equity side of this Court. And after due consideration it is ordered that plaintiff's motions to strike from answer of E. J. Groesbeck and from answer of defendant Receiver, be, and the same is hereby denied. Whereupon, plaintiff moves for judgment upon the pleadings and proof and the Court being well advised in the premises, doth deny said motion. And thereupon the Court finds in accordance with an oral opinion in favor of defendants, with directions to prepare and submit form of decree in accordance with said opinion.

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66 (Decree, December 31, 1925.)

This cause came on regularly for trial on the 2nd day of December, 1925, before the Court, Honorable Tillman D. Johnson, Judge. The Court having heard all of the evidence in behalf of all of the parties hereto, and the cause having been argued and submitted for decision, and the Court having been fully advised in the premises, does hereby find that the subject matter of this action has heretofore been fully determined and adjudicated by decree of this Court made and entered on the 10th day of June, 1924, in case No. 8069, entitled "Salt Lake County, a subdivision of the State of Utah, E. J. Groesbeck, County Treasurer of said Salt Lake County, and American Surety Company of New York, a corporation, plaintiffs, vs. Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, a national banking association, defendant, National Surety Company of New York, a corporation, Americian Indemnity Company, a corporation, and Massachusetts Bonding & Insurance Company, a corporation, Interpleaded Defendants."

67 Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the issues herein be and they are found in favor of the defendant Jenkins, as Receiver, and the American Surety Company of New York and E. J. Groesbeck, interpleaded defendants, as follows:

1. Plaintiff's claim herein sued upon is approved and allowed, subject to the following conditions, limitations and qualifications:

(a) That the National Surety Company, plaintiff, shall have and recover nothing from the defendant Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City, until and after such time as the said Jenkins, Receiver, shall have paid to the American Surety Company or until the American Surety Company shall have received out of the assets of said bank, including the proceeds from the $360,000.00 par value of Crystal Lake Farms Company bonds, the sum of $223,362.15, together with interest at the rate of 8 per cent per annum on the sum of $200,000.00 from the 29th day of February, 1924, all as provided in that certain decree of June 10, 1924, hereinbefore referred to.

(b) That the allowance of the National Surety Company's claim herein sued upon, shall not affect the present basis of computing and paying dividends as now established by the Receiver upon claims heretofore approved.

(c) That the Receiver shall not set up the claim of the National Surety Company herein sued upon on his books as an aproved claim upon which dividends are to be paid, nor shall be set aside any funds or assets for the payment of dividends thereon, nor shall he pay any dividends thereon, and plaintiff's claim to share at this time in dividends upon said claim, is denied. The right of said National Surety Company on account of said claim to participate in the assets of said bank after the payment of the American Surety Company in full, as above provided, as against the defendant Jenkins as Receiver, and as against the other creditors of this bank, is not by this decree determined.

Dated this 31st day of December, 1925.

TILLMAN D. JOHNSON
Judge.

Filed December 31, 1925. John W. Christy, Clerk.

68 Order Giving Plaintiff and National Surety Company Until March 15, 1926, to Serve and File Condensed Statement of Evidence.

Good cause appearing therefor, it is hereby ordered that the plaintiff National Surety Company may have to and including March 15, 1926, within which to file its Condensed Statement of the Evidence herein.

TILLMAN D. JOHNSON, Judge.

Dated January 26, 1926.

Filed in United States District Court, District of Utah, Mar. 20, 1926. John W. Christy, Clerk.

Order Extending time to Plaintiff and National Surety Company Until April 5, 1926, to Serve and File Condensed Statement of Evidence.

Good cause appearing therefor, it is hereby ordered that the plaintiff National Surety Company may have to and including April 5, 1926, within which to file its Condensed Statement of the Evidence herein.

TILLMAN D. JOHNSON, Judge.

Dated: March 13, 1926.

Filed in United States District Court, District of Utah, Mar. 20, 1926, John W. Christy, Clerk.

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69 Condensed Statement of Evidence

(Filed in U. S. District Court on March 25, 1926.)

Be It Remembered that the trial of the above entitled action was begun on the 2nd day of December, 1925 and concluded on the 3rd day of December, 1925, at Salt Lake City, in the District of Utah, before Honorable Tillman D. Johnson, District Judge; and the cause was submitted to the Court for its consideration and decision on said 3rd day of December, 1925; Testimony of witnesses and documentary evidence were introduced by the several parties, Arthur E. Moreton appearing for the plaintiff, National Surety Company, and Messrs. Bagley, Judd and Ray appearing for the defendant Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, and Messrs. Cheney, Jensen, Martineau and Stephens appearing for the interpleaded defendants, E. J. Groesbeck, County Treasurer of Salt Lake

County, and for the American Surety Company of New York, a corporation. A simple and condensed statement of all of such evidence (both oral and documentary) is hereby prepared by the plaintiff National Surety Company, a corparotion, and lodged in the office of the Clerk of said Court, agreeable to and in conformity with law and the rules of
70 Court regulating such matters, for approval by the Court and filing in the Clerk's Office as a part of the records of appeal in said cause, as follows:

The Court: You may proceed, gentlemen.

Mr. Jensen: If the Court please, at the outset of this matter, I understand the case is now on the Law side; I think it is clearly an equitable case; as the pleadings now stand, it is an application on the part of the National to have their claim against the Receiver allowed and involves merely the allowance of a claim. I think it is important that the case should be on the proper side of the docket.

Mr. Moreton: The situation is just this, as I understand it, we have brought an action at law herein upon a written contract. The defendants have attempted to raise some equitable questions by their answers. We have filed our motion to each of their answers to strike therefrom those portions which relate to equitable matters, on the ground that they are immaterial, irrelevant, sham and frivolous and should not be considered.

Mr. Ray: I take the position that the action itself is an action for equitable relief. The National Surety Company cannot come in here and get a judgment against the Receiver for any particular sum of money on account of the claim as against him. What he can get is a decree of this Court that his claim shall be allowed; that thereafter he shall participate pro rata with other creditors. His relief must be equitable upon the face of his complaint.

Mr. Moreton: I do not agree with counsel that that makes it an equitable action. The gravemen of our complaint is at law on an express contract.

The Court: The case is set for trial before the Court, without a jury, and a jury is waived. If it is an equitable action, of course the Circuit Court of Appeals would review the facts.

Mr. Jensen: If the Court please, I feel so far as we are concerned we are perhaps in the technical position to
71 have it regarded as a law action, that is, I mean, so far as technical advantage is concerned, but I really,

sincerely feel it merely involves the allowance of a claim in a money judgment; that it is equitable in character; that it ought to be on the equity side.

The Court: I will express my opinion if you desire me to after I have heard all the testimony in the case and heard your argument, but after all, my view of it would not be determinative; you might lose your rights in the Circuit Court of Appeals by not preserving a law record. You maintain it is a law case. You better preserve your record as if it were. If you are right you will get your case reviewed, if it is necessary for you to have it reviewed.

Mr. Moreton: Personally, of course, I would like, if it is going to the Circuit Court, to have the facts reviewed. On the other hand, there are certain defenses that are put in here that I think are not equitable.

The Court: We will get to that then when we get to your defense. In any event, the Court is going to try the case. The plaintiff may proceed to try its side of the case, and when we get to the answer you can raise all the questions you desire to.

Mr. Jensen: We filed our original answer and will now ask permission to file an amended answer.

Mr. Moreton: We make no objection to it, except that it presents those equitable questions, the same as the original did, but elaborates somewhat upon them.

The Court: I will pass upon that when I get to it. If they constitute no defense, and the Court so holds, you are protected. The record may show that the reply filed by the plaintiff National Surety Company shall be deemed and considered as a reply to the amended answer of the American Surety Company and Groesbeck and that in turn the plaintiff's motions may be considered as applying to this amended answer.

The defendants admit the formal allegations contained in paragraphs 1, 2, 3 and 4 of the complaint, with the qualification that the National City Bank is not now a going concern.

72 Mr. Jensen: We do not admit paragraph 6 in the way it is pleaded.

The Court: That is a construction that the Court must finally determine.

Mr. Jensen: We admit that on the 3rd day of January, 1921, the National City Bank executed and delivered to Mr. Groesbeck, its depository bond in the sum of $125,000.00 and as an inducement to secure the treasurer to make the deposit of money, and that the bond was furnished by the National Surety Company; that the bank furnished the bond as required by Section 4500 of the Compiled Laws of Utah 1917, and the treasurer deposited funds in the bank as such.

Mr. Moreton: That is the same bond that was offered in the other action and it is pleaded and attached to the complaint and made a part of the complaint.

FRED A. MORETON, a witness produced by the plaintiff National Surety Company, being first duly sworn, testified upon direct examination as follows:

I reside at Salt Lake City. My business is insurance and surety bonds. During the year 1920 I was and still am an attorney in fact and Resident Assistant Secretary of the National Surety Company and connected with the J. B. Moreton Company, who are general agents of the National Surety Company for the State of Utah. I am and was acquainted with E. J. Groesbeck in December, 1920, and also with the National City Bank of Salt Lake City.

Mr. Jensen: It is admitted that E. J. Groesbeck took office as County Treasurer on January 1, 1921, and has ever since been such treasurer.

The National City Bank applied to the National Surety Company for a depository bond in the month of December, 1920, and made the customary written application for this depository bond on our form, and submitted it to us with a letter over the signature of the cashier. Exhibit 1 is a copy of this application referred to.

Mr. Jensen: We raise no question on the ground it is a copy.

73 The application was signed: "National City Bank by J. P. Gardner, Vice-President, Frank Pingree, Cashier." The original of that application was delivered by the National City Bank to the National Surety Company on or about the 22nd day of December, 1920, the date it bears Pursuant to that application, the National Surety Company issued a depository bond, as requested in said application. Exhibit 2 is a copy of the bond issued by the National Surety Company pursuant to that application. The National Surety;

Company and J. B. Moreton Company as its agent, in executing and delivering this bond, Exhibit 2, relied on the statements contained in the application, Exhibit 1. When the original of this depository bond. Exhibit 2, was executed, it went to the bank for the bank's signature first, and then it was delivered to County Treasurer Groesbeck. The original bond was executed, at the conclusion thereof, by the "National City Bank of Salt Lake City, by H. J. Wallace, vice-president, Attest, F. M. Pingree, Cashier."

Mr. Moreton: We offer in evidence Exhibits 1 and 2. As stated, there is no objection to our offering copies instead of the originals.

Mr. Ray: May I make this objection to the offer, if the Court please, in behalf of the Receiver, that the Exhibits one and two are immaterial and incompetent and irrelevant for the reason, first, that the liability, if any there be, arising out of such exhibits has, as appears from the pleadings in this case, already been adjudicated and determined: second, that it does not appear either from the pleadings or from any of the evidence shown that the creditors of the National City Bank whom this bond secures have been paid in full, and until they are, this Exhibit would be immaterial.

The Court: The objection will be overruled. Those matters will all come up on the final argument.

Mr. Jensen: If the Court please, in the interest of time, may we have this stipulation that any evidence offered or the benefit of any cross-examination or any objections or exceptions made in behalf of the Receiver or of the
74 American Surety Company or Mr. Groesbeck, shall apply equally as to any of those parties.

The Court: It may be so understood. Objection for one is in behalf of all.

Mr. Jensen: Yes, and testimony offered by one is testimony, or cross-examination, is testimony for all.

The Court: It may be so understood.

(Exhibit 1 is in words and figures as follows:)

"Notice: Agents' acts not binding on Company unless within Agents' written limits of authority.

'Safety First'
National Surety Company
Capital and Surplus Over $8,000,000.00.

"Application by a Bank or Trust Company for Depository Bond National Surety Company:

Application is hereby made by the undersigned for a bond, the amount and tenor of which are herein set forth.

1. Name and location of Bank or Trust Company, (Give correct corporate title.) National City Bank of Salt Lake City, Utah.

2. Name of Obligee to whom bond is to run Edw. J. Groesbeck, County Treas.

3. Amount of bond, $125,000.00.

4. Maximum amount of deposits bond is required to secure, $125,000.00.

5. (a) Specify rate of interest to be paid 2½. (b) Moneys covered by this bond County.

6. Date from which bond is required Jan. 1, 1921.

7. Date upon which bond is required Dec. 31, 1922.

8. Do you agree to pay $625.00 premium annually yes.

9. When was Bank or Trust Company incorporated, and under the laws of what state was the incorporation had? Utah—1912.

10. Date of beginning business Feb. 1913. If reorganized, state when.....

11. Authorized capital $250,000.00.

12. Amount of Stockholders' liability, if a State Bank, $.....

13. When was last dividend declared, paid and amount.. .....

14. When was the last examination made by National or State Bank Examiner? Nov. 29, 1920.

15. Do you belong to the Clearing House Association? Yes.

15a. If not, why do you not belong to the association?

16. Gives names and titles of the officers who give continuous personal attention to the affairs of the Bank or Trust Company.

Name	Titles
Frank Pingree	Cashier
W. G. Goodart	Asst. Cash.
Geo. N. Lambourne	President
J. P. Gardner	Vice-Pres.
Henry W. Wallace	" "

17. By whom are the loans of the Bank or Trust Company directly authorized?

75 18. The following is a true financial statement of said Bank or Trust Company, showing its resources and liabilities at the close of business on the 22nd day of Dec. 1920:

Resources		
Loans and Discounts		2129631.70
Amount of above loans to directors.....		
What amount secured by collateral	$60550.00	
Amount of above loans to officers, not directors, approved by directors		
What amount secured by collateral		
Overdrafts, secured, $.....; unsecured, $.....;		3262.31
U. S. Bonds to secure Circulation		250000.00
U. S. Government, State & Municipal Bonds		1327227.12
Other stocks, bonds, mortgages....		
Banking House $.....		
Furniture & Fixtures, $.....		100000.00
Other Real Estate Owned		
Due from approved Reserve Agents	$476236.47	
Due from other Banks and Bankers	$521313.10	
Checks and other Cash Items	$ 20992.73	2118542.30
Fractional Currency, Legal Tender Notes, Specie, etc. $.....		
Total		
Other Resources		12500.00
Total Resources		5941163.43
Liabilities.		
Capital Stock paid in	$250000.	
Paid in Surplus, $.....Earned Surplus	550000.	
Undivided Profits	9211.95	
National Bank Notes outstanding	246100.00	
Due to Banks	324693.76	
Individual Deposits subject to Check	$.....	
Time Certificates of deposit	$.....	
Postal Savings Deposits	$ 65558.87	
Other Deposits	$4112756.34	5063320.92
Total		

Dividends unpaid	.....
Notes and Bills Rediscounted	777842.51
Bills Payable	100000.00
Other Liabilities	.....
Total Liabilities	5941163.42

19. State rates of interest paid on various classes of deposits Ind. Dep. 2½%—Time certif. of dep. 4%—Sav. Dep. 4%—Other deposits 4%.

20. Specify Town, City, County and other public or special deposits:

Depositor	Amount deposited	Rate Int. %	Surety Bond	Amt. of Bond	Date of Expiration

76 21. Do officers and employees give Corporate Surety Bonds? Blanket Bond.

Give name of Surety U. S. F. & G. Co. Expiration date.. .....

2. Does Bank carry Burglar Insurance? Yes.
Amount 150,000.00. Name of Company Nat'l Surety. Expiration 1922-1923.

23. How much past due paper are you carrying? None.

24. If a National Bank, state whether you are on the Comptroller of the Currency's Special List. Yes.

This Agreement, made between National City Bank (hereinafter called the Depository), and the National Surety Company (hereinafter called the Company), Witnesseth:

Whereas, the Company has executed, or is about to execute, for the Depository, the bond described in the foregoing application, which application is hereby referred to and made a part of this Agreement:

Now, Therefore, in consideration of the execution of said bond and the sum of One Dollar paid to the Depository by the Company, the Depository covenants and agrees with the Company as follows:

1. That all declarations and answers made in the foregoing application are true, and that the same are made for the purpose of inducing the Company to execute the Bond applied for without demanding collateral security from the Depository.

2. That the Depository will pay to the Company, or its duly authorized Agent, the premiums agreed in said application to be paid.

3. That the Depository will, at all times, indemnify and keep indemnified the Company and save it harmless from and against all claims, demands, liabilities, costs, charges and expenses of every kind and nature which it shall at any time sustain or incur and as well from or against all orders, judgments, and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money to meet every claim, demand, liability, cost, charge, expense, suit, judgment or adjudication against it by reason of the execution of the Bond applied for and before the Company shall be required to pay thereunder.

4. That the Depository will immediately notify the Company at its principal offices in the City of New York, of the making of any demand or the giving of any notice or the commencement of any suit or proceeding, or the fixing of any liability which the Company may be called upon to discharge, by reason of the execution of said Bond.

5. That the Depository will, on request of the Company, procure the Company's discharge from liability under said Bond, and the Company shall, at its option, have the right to the use of the Depository's name, and at any time shall have the right to be discharged from liability for the further default of the Depository and to require the Depository to account and give new surety or sureties.

6. That vouchers or other other evidence of payment by the Company in discharge of any liability under said Bond shall be prima facie evidence against the Depository of the fact and amount of the Depository's liability to the Company.

7. That the Company shall have the right to look to and rely upon the property of the Depository and its income and earnings, and to follow and recover out of Depository's property now belonging to it, or which may hereafter belong to it, and the income and earnings thereof, for anything due or to become due the company under this Agreement, the execution of the said Bond by the Company being for the Depository's special benefit and protection of the Depository's property, its income and earnings.

8. That the acceptance of this Agreement, and of the Depository's agreement to pay premiums for the execution of said Bond, or the acceptance at any time by the Company of other security, shall not in any way abridge or limit the right of the Company to be subrogated to any right or remedy, or limit any right or remedy which the Company might otherwise have, acquire, exercise, or enforce, and the Company shall have every right and remedy which the individual surety acting without compensation would have.

9. It is understood and agreed that the Company reserves the right to decline to issue the bond for which application is hereby made, and that no claim may be made against the Company in consequence of its failure to execute such bond; nor shall any claim be made in case the bond, executed, be not accepted by or on behalf of the obligee.

In Witness Whereof, the Depository, by authority of its Board of Directors, or Trustees, has caused this agreement to be duly signed by its President, and Cashier or Secretary, and its corporate seal to be thereto affixed this 22 day of December 1920.

In presence of

THE NATIONAL CITY BANK OF SALT LAKE CITY,
Give Name of Bank.
By J. P. Gardner, President.

Attest:

Frank Pingree, Cashier.

(Affix Corporate Seal)"

(The following is printed along left-hand margin of the face of Exhibit 1:)

"Under Chapter 340 of the laws of 1912 of the State of New York, any person obtaining property or credit by use of a false statement is guilty of a misdemeanor punishable by fine or imprisonment or both."

(Exhibit 2 is in words and figures as follows:)

"Depository Bond.

Know All Men By These Presents: That The National City Bank of Salt Lake City, Salt Lake County, Utah as

Principal, and The National Surety Company, a corporation of the State of New York, as surety, are held and firmly bound unto Edward J. Groesbeck, Treasurer of Salt Lake County, Utah, in the sum of One Hundred and Twenty Five Thousand ($125,000.00) Dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our and each of our successors and assigns, jointly and severally by these presents.

Dated the Third day of January, A. D. 1921.

Whereas, the said principal The National City Bank of Salt Lake City, has applied for a part of the funds in the treasury of the County of Salt Lake, State of Utah, to be deposited in said bank, the amount whereof shall be subject to withdrawal or diminution by said treasurer as the requirements of the said County of Salt Lake shall demand, and which amount may be increased or decreased as the said treasurer may determine; and

Whereas, the said Bank, in consideration of said deposit, and for the privilege of keeping the same, has agreed to pay to the said County of Salt Lake, State of Utah, interest on such sum at a rate not less than two per cent per annum, on the amount of said deposit, the same to be credited and paid monthly upon the daily average of such amount as the said bank shall have on deposit for the month, or any fraction thereof, next preceding the crediting or payment of said interest, which interest shall be computed and credited to the account of the Treasurer of Salt Lake County, and shall become thenceforth a part of such deposit.

Now, Therefore, if the said The National City Bank of Salt Lake City, shall, at the beginning of each and every month render to the said Edward J. Grosbeck, Treasurer, a statement, in duplicate, showing the daily balance of the County of Salt Lake's moneys held by it during the month next preceding and the interest thereon, and how the
78 same has been credited, and shall well and truly keep all said sums of money so deposited or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of the said Edward J. Groesbeck, Treasurer as aforesaid, and shall pay over the same, and any part thereof, upon the check or written demand of the said Edward J. Groesbeck, Treasurer, and to his successor in office as shall be by him demanded, and shall calculate, credit and pay said interest as aforesaid, and shall in all respects save and keep the said Edward J. Groesbeck, Treasurer,

harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue.

Provided, That, if the said Surety shall so elect, this bond may be cancelled at any time by giving thirty days notice in writing to the said Treasurer, and to the persons authorized by law to approve of such bond, such notice to be accompanied by a sworn statement of all facts and setting forth the reasons in connection with such request for cancellation, and this bond shall be deemed cancelled at the expiration of said thirty days, the said Surety remaining liable for all or any acts covered by this bond which may have been committed by said The National City Bank of Salt Lake City, up to and including the date of expiration of said thirty days notice. The said surety shall, upon the surrender of this bond and its release from all liability thereunder, upon request, refund this premium paid, less a pro rata part thereof for the time this bond shall have been in force.

Signed and sealed the day and year first above written.

THE NATIONAL CITY BANK
SALT LAKE CITY
By H. J. Wallace,
Vice-President.

Attest:
F. M. Pingree,
Cashier.

NATIONAL SURETY COMPANY
By J. B. Moreton,
Its Attorney-in-fact."

Direct Examination of Fred A. Moreton resumed:

When this bond was applied for, the National Surety Company demanded the execution of the application as a consideration precedent to the delivery of the bond. The application was actually delivered to the National Surety Company, or rather, to our office as general agents, before the bond itself was delivered.

Mr. Jensen: With respect to paragraph 9 of the complaint, we have admitted in our answer that Groesbeck made deposits in the bank from the 3rd day of January, 1921, until the bank closed its doors and suspended business, that pur-

suant to the arrangements made he had deposited the funds of Salt Lake County in that bank, and that the credit on the books of the bank as of the date it closed, January 17, 1922, was the sum of $643,094.29, being the amount of the deposit on said date; in other words, he had put money in the
79 bank to the amount of $643,094.29, and that on that date that was the amount of the deposit. We admit that the bank failed on January 17, 1922, and there is no dispute on that. We admit that thereafter demand was made upon the National Surety Company by E. J. Groesbeck as Treasurer, for the payment of the penalty of plaintiff's bond in the sum of $125,000.00, and after such demand the National Surety Company, on the 17th day of June, 1922, paid to E. J. Groesbeck, as treasurer of Salt Lake County, the full sum of $125,000.00, and that this money went into the County Treasury of Salt Lake County. We admit the first sentence of paragraph 10 of the complaint, that is, the assignment of $5,000.00 of the $125,000.00 to the American Indemnity Company, and that the Receiver has paid the National Surety Company nothing.

Mr. Moreton: With respect to paragraph 11, the plaintiff therein alleges it duly presented and filed with the defendant its verified claim for the sum of $120,000.00 by virtue of said Indemnity Agreement, a true copy of which is attached to plaintiff's complaint and marked Exhibit "C". Gentlemen, are you willing to admit that allegation?

The Court: You admit, do you not, Mr. Ray, that he presented to the Receiver a claim of $120,000.00, of which the document he now holds in his hands is a copy?

Mr. Ray: We admit that.

Mr. Jensen: We admit that.

Mr. Ray: We object to its admission in evidence because it is irrelevant and immaterial, but do not object upon the ground it is a copy.

The Court: The objection may be overruled. Instead of having it marked here as in independent Exhibit, the record may show that the offer made is the copy of the claim attached to the complaint.

Mr. Ray: We will admit that this claim was received by the Receiver on the 10th day of April, 1925.

Mr. Jensen: Yes, we will admit that.

The Court: That is the claim that is sued on in this case, is it not?

80 Mr. Moreton: That is the claim sued on. I take it that the defendants will admit that the defendant Jenkins, Receiver, refused and now refuses to allow or approve this claim or pay the dividends thereon.

Mr. Ray: We admit that.

The National Surety Company has not been paid by any one any part of this $125,000.00 sued upon.

Cross-Examination of Fred A. Moreton

By Mr. Jensen:

I was not a witness in the suit wherein Salt Lake County, American Surety Company and E. J. Groesbeck were plaintiffs and the National Surety Company and the Receiver were defendants. I do not know whether the National Surety Company presented another claim to the Receiver. I have no information about that. The National Surety Company furnished only one bond to Mr. Groesbeck as surety for the National City Bank. It received two applications at the same time. One was for $250,000.00 bond covering state funds and $125,000.00 covering county funds, but only one on county funds. So far as the county funds are concerned, it received only one application from the National City Bank, at that time and furnished only one bond to Mr. Groesbeck.

Mr. Jensen: It is stipulated the same bond is involved here and the same indemnity as were involved in the prior suit.

Mr. Moreton: Yes, for the purpose of identity, but without admitting the materiality of it.

Thereupon the plaintiff rested.

The defendant EDWARD E. JENKINS, was sworn and testified on direct examination as follows:

I am Receiver of the National City Bank of Salt Lake City and the defendant in this action.

Mr. Moreton: Referring to the answer of the defend-
81 ant Receiver, Jenkins, the plaintiff has moved to strike therefrom paragraphs 23, 24 and 25, on the grounds set forth in the motion, that the same is sham, immaterial and irrelevant and do not constitute a defense to the complaint.

The Court: The motion will be denied.

Mr. Moreton: Save an exception.

Mr. Moreton: Your Honor, the plaintiff National Surety Company likewise made a motion to strike from the defendants Groesbeck and American Surety Company's answer certain portions therein set forth in my motion. There are two motions to strike, one from each answer.

The Court: Both motions will be denied. You may have your exception.

At the time the National City Bank failed and I was appointed Receiver, there was on deposit to the credit of E. J. Groesbeck, treasurer of Salt Lake County, the sum of $643,094.29. I was made Receiver on February 3, 1922, and have been ever since. Upon examination of the books, it became apparent that the assets of the bank would be insufficient to repay the depositors in said bank, and I understand that Groesbeck, as treasurer, made demand upon the bondsmen for the bank, including the National Surety Company. I concurred in that payment made by the National Surety Company to the county. The Fidelity & Deposit Company of Maryland executed a depository bond to the treasurer in behalf of the bank in the sum of $75,000.00. This $75,000.00 bond was paid to Salt Lake County and thereafter I issued to the Fidelity & Deposit Company a Receiver's certificate for $75,000.00, which certificate was issued first to Groesbeck, then, upon assignment, was turned over to the Fidelity & Deposit Company, upon Groesbeck's order. So it now holds the Receiver's certificate upon which I have been issuing dividends, and the claim of the treasurer of Salt Lake County was thereby reduced from $643,094.29 to $568,094.29, and that is the amount of the claim upon which I have been paying dividends to Mr. Groesbeck as treasurer.

Mr. Moreton: We will admit that the sum of $125,-
82 000.00 was paid by the National Surety Company to Salt Lake County, without prejudice to the rights of the surety company to claim subrogation pro tanto or to claim reimbursement from the bank, the $125,000.00 being deposited in the funds of Salt Lake County.

On the 7th day of September, 1922, a dividend of twenty per cent was paid to the creditors of the bank, and the twenty per cent paid on account of this deposit by Groesbeck as treasurer, amounted to $113,618.84.

Mr. Moreton: I object to this line of testimony for the reason that it is immaterial, irrelevant and not a defense to the cause sued upon.

The Court: The objection may be overruled and you may have an exception.

Thereafter, on the 27th day of February, 1923, an additional ten per cent, amounting to $56,809.42, was paid to Groesbeck as treasurer, a payment in the same proportion being paid to all general creditors of the bank on the same date, where the claims had been approved.

Mr. Ray: I refer to paragraph 21 of the answer next, and ask the plaintiff if it will stipulate that I may read from the Transcript of the Record made for the Eighth Circuit Court of Appeals in case No. 6819, being entitled National Surety Company, a corporation, appellant vs. Salt Lake County, a subdivision of the State of Uah, et al., appellees, the stipulation with respect to the payment to Salt Lake County of $47,000.00 of the fourth dividend.

Mr. Moreton. I object to it as immaterial.

The Court: The objection may be overruled and you may have an exception.

Mr. Ray: I refer to page 49 of the record and to the last paragraph thereof, which reads as follows:

"Mr. George G. Armstrong: If the Court please, in behalf of the plaintiff, Salt Lake County, and also that will cover Mr. Groesbeck, attorneys for the parties present have stated to me that they were willing to stipulate that the amount set forth as being the balance that was due to Salt Lake County, forty-seven thousand some odd dollars, is payable to Salt Lake County, we waiving any claim for interest against the Receiver on that amount; and as I understand if this
83 stipulation is entered into, that Salt Lake County will no longer (—) required to appear in the case,—that the case will then resolve into a contest between the surety companies that are interested here.

I would like to ask counsel if I have stated the stipulation correctly.

Mr. Jensen: So far as the American Surety Company is concerned, your Honor, it joined with the county in this suit and it has no disposition, and I am advised that the county had no disposition to attempt to collect any interest against the Receiver. We are satisfied that the Receiver

was in a difficult situation in the sense that he could not pass—did not want to pass upon the merits of the contending claims of the surety companies and he held the money until those claims could be decided.

So far as the American Surety Company is concerned, it does not desire to make any claim against the Receiver on account of any interest on any of this money that has been withheld that it may be adjudged by the court to be entitled to, and it has no quarrel with the county being entitled to the sum of $47,666.01 out of this dividend which has been held back by the Receiver. I think all parties admit that the county is entitled to that payment.

Mr. Moreton: In behalf of the National Surety Company and the American Indemnity Company, interpleaded herein as defendants, whom I represent, I will state that the stipulation is substantially as stated by judge Armstrong, that is to the effect that the county is entitled to the sum of $47,666.01 which amount will reimburse the county and make it whole by reason of its deposit in the National City Bank in the sum of some six hundred and forty three odd thousand dollars.

The Court: Who represents the county?

Mr. Armstrong: I represent the county, your Honor.

The Court: Then an order can be made paying the county.

Mr. Armstrong: Mr. Ray is here.

Mr. Ray: We will ask in pursuance of the stipulation that an order be entered by the court requiring the Receiver to pay over to Salt Lake County the sum of $47,666.01, and when that order is entered the Receiver will immediately make that payment to the county.

The Court: Let the order be entered—

Mr. Jensen: Just one minute: what is the position of the Massachusetts Bonding Company?

Mr. Ray: The Massachusetts Bonding & Insurance Company, who has been interpleaded and is represented by Mr. Judd—is not represented by Mr. Judd at this time, Mr. Judd being in the Supreme Court, but he is a member of my firm, and has authorized me to represent that the Massachusetts Bonding & Insurance Company concurs with the

National Surety Company and American Surety in the stipulation which was outlined by Judge Armstrong.

The Court: Then Salt Lake County may be dismissed from this proceeding, that is the effect of it, isn't it?

Mr. Moreton: That is the effect of it."

Mr. Ray: You stipulate, Mr. Moreton, those proceedings took place as stated in the record, do you not?

Mr. Moreton: Yes, without admitting their materiality and reserving the objection heretofore made.

The Court: The objection may be overruled and you may have an exception.

84 The Receiver's certificate issued to E. J. Groesbeck, as treasurer of Salt Lake County, in the sum of $568,094.29, is still outstanding. As Receiver, I have paid on account of that certificate sixty per cent, amounting to $340,856.52. I have further alleged in my answer that in addition to that sum, Treasurer Groesbeck received from the plaintiff National Surety Company $125.000.00, and $25,000.00 from the Massachusetts Bonding & Insurance Company. There is left unpaid on account of this certificate the sum of $227,237.71.

I had paid creditors at the date of the filing of my answer, sixty per cent of the face of their claims. I have been unable to pay any more since then. In my opinion, the most that we will be able to pay the creditors from now -on is another fifteen per cent. The Crystal Lake Farm Company bonds of the par value of $360,000.00, have no practical value at this time. I have been familiar with these bonds and their history ever since the failure of the bank. In my best judgment there will be a loss of twenty five per cent to depositors and creditors of the bank.

The Court: Are you going to contest that statement at all, on the inability to pay more than 75 per cent on the indebtedness?

Mr. Moreton: I don't know your Honor. The receiver is in a better position to state what the fact is than we are. If the receiver states that is the fact it is undoubtedly true.

In order to pay a ten per cent dividend to creditors, it is necessary to have on hand the sum of $158,382.03. The recognized claims against my trust amount to $1,583,926.88, according to my report to the Comptroller as of this date.

Q. So in order for you to pay fifteen per cent additional you have to get from the assets,—realize from the assets, some $237,000 or $240,000?

A. At fifteen per cent, yes.

Mr. Moreton: Our objection goes to all this, your Honor, that it is immaterial and does not constitute a defense.

The Court: The objection may be overruled and you
85 may have an exception. We will consider that matter when we get all the testimony in.

Mr. Moreton: May that objection and exception be considered to all this line of testimony? I made the objection once before, but haven't repeated it, but may I have the benefit of it throughout?

The Court: It may be so understood.

Mr. Ray: Referring again to paragraph 25 on the top of page 10, you set forth in your complaint it will require the sum of $85,000 and some additional to pay the fifteen per cent dividend on account of the Groesbeck certificate; is that correct?

Mr. Moreton: Same objection and exception.

A. Yes.

86 Q. Let me ask you this question, Mr. Jenkins, if you were required at this time to pay the National Surety Company and the Massachusetts Bonding and Insurance Company as general creditors as claimed in this suit, you would have to pay them sixty per cent at once, wouldn't you, to have them paid equally with your other creditors?

Mr. Moreton: Object to that as being immaterial.

The Court: That is the same objection.

A. Yes.

The Court: Objection overruled.

Mr. Moreton: Exception.

Mr. Ray: After having done that would you then, in your opinion, be able to realize sufficient assets from the assets of this bank to pay the creditors of the bank the full amount of their claims?

Mr. Moreton: It is apparent he cannot even now pay the creditors the full amount of their claims. The addition of another claim would—

Mr. Ray: That is preliminary.

The Court: He may answer.

Mr. Moreton: Exception.

A. No.

Q. Referring particularly to the treasurer of Salt Lake County and the American Surety Company as creditors and having in mind, Mr. Jenkins, that they have had in addition to your dividend $150,000 from the depository sureties, would you be able to pay them out in full in the event you were required to pay sixty per cent to the National Surety Company and the Massachusetts Bonding Company?

Mr. Moreton: Object to that as immaterial and irrelevant, not within the issues, and not constituting a defense, and being a question that should not be raised here by the Receiver. Seems to me it is no interest of his how many claims are allowed so long as they are just claims.

87 The Court: I think it is quite apparent from the testimony heretofore given that he would not be able to pay out from any standpoint, so he may answer.

Mr. Moreton: Save an exception.

A. No.

The Court: The defendant is contending that the county must be paid in full before you are paid at all. Assuming that contention were true, will there be anything left to be distributed after the county is paid, as you understand it?

Mr. Moreton: I understand there will be. The county will be overpaid if these dividends are continued to be paid. As it now stands, the county has been made whole by reason of the payment in part by this plaintiff of $125,000.00 and $25,000.00 by the Massachusetts Bonding Company, together with the dividends that have heretofore been paid.

Mr. Jensen: If the Court please, so far as Salt Lake County is concerned, it was paid in full at the commencement of the other suit by the order that it takes $47,000.00. We are now in this situation, that the Court there gave the American Surety Company, as the assignee of Groesbeck and as his subrogee, a judgment for $200,000.00, with interest at the rate of eight per cent from February 29, 1924, and also an additional judgment for $23,000.00. The county hasn't any claim against the Receiver at all, but Mr. Groesbeck has a claim of $223,362.15 with interest at eight per cent

on $200,000.00, of which he has received to date $125,780.08. There is a balance due the American now of $125,666.00. If an additional fifteen per cent is paid, it would run around $88,000, something like that, he would still be short a matter of $40,000, or more.

The Court: Do you dispute that?

Mr. Moreton: Yes, your Honor, I cannot agree to counsel's statement. We claim the county has long ago been paid in full. It is claimed here that this certificate of Groesbeck is outstanding and there is so much due
88 upon it. As to whether there is anything due upon it, is a question of law.

The Court: So that, as the matter now stands, upon the theory of the defendants', there would never be any assets out of which you could be paid anything.

Mr. Moreton: That is a fact, unless, of course, our claim were allowed.

Mr. Ray: Was it understood that on matters where we have community of interest, the Receiver, the American and Groesbeck, where the same proof would supply both of our needs, it may be considered as applying to both of us?

The Court: Certainly.

Mr. Jensen: I have marked here as Exhibit 3, the Transcript of the Record in the United States Circuit Court of Appeals in case No. 6819 and 6820, which has been referred to as having been tried in this Court involving the suit of National Surety Company a corporation, appellant, vs. Salt Lake County, et al. We offer the Complainant in that case, which commences at page 1 of exhibit 3 and continues to page 7, with its Exhibit.

(The part of the former record designated and offered is in words and figures as follows:)

"Complaint.

In the District Court of the United States, in and for the District of Utah, Central Division.

Salt Lake County, a subdivision of the State of Utah, E. J. Groesbeck, County Treasurer of said Salt Lake County, and American Surety Company of New York, a corporation, Plaintiffs,

No. 8069. vs. Law.

Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, a national banking association, Defendant.

Plaintiffs complaint of the defendant, and for cause of action allege:

89

I.

That at all times herein mentioned, Salt Lake County was and is a county duly organized and existing under the laws of the State of Utah, and a subdivision of said State of Utah, with power to sue and be sued; that the plaintiff E. J. Groesbeck was, during all the times herein mentioned, and now is the duly elected, qualified and acting County Treasurer of Salt Lake County, Utah, and as such, among other things, was required by the laws of the State of Utah to receive all moneys belonging to said Salt Lake County, and to safely keep the same and apply and pay out the same according to law; that the plaintiff American Surety Company of New York was, during all the times herein mentioned, and now is a corporation organized and doing business under the laws of the State of New York and duly authorized to do business under the laws of the State of Utah, by reason of a compliance with the laws of the State of Utah, with reference to doing business therein.

II.

That the defendant Edward E. Jenkins is, and was, during all the times herein mentioned and since on or about the 17th day of January, 1922, has been, the duly appointed and acting Receiver of the National City Bank of Salt Lake City, Utah; that the said National City Bank of Salt Lake City, Utah, was a national banking association duly organized and existing under and by virtue of the National Banking Act, with its office and principal place of business at Salt Lake Citay, Utah.

III.

That on or about the 3d day of January, 1921, the said E. J. Groesbeck as said County Treasurer, furnished and filed, as provided by law, his official bond with the American Surety Company of New York thereon as surety, for the penal sum of Two Hundred Thousand ($200,000.00) Dollars, which was conditioned as follows:

'The Condition of This Obligation Is Such, that Whereas, the above bounden principal has been duly elected to the office of County Treasurer in and for Salt Lake County, for a term beginning January 3, 1921.

'Now, therefore, if the said Edward J. Groesbeck shall well, truly and faithfully perform all official duties now re-

quired of him by law and also such additional duties as may be imposed on him by any law of the State, subsequently enacted, and if he shall account for and pay over and deliver to the person or officer entitled to receive the same, all moneys or other property that may come into his hands as such County Treasurer, then this obligation to be null and void and of no effect; otherwise to be and remain in full force and virtue.'

IV.

That prior to the 17th day of January, 1922, said E. J. Groesbeck, as County Treasurer of Salt Lake County, received into his hands and possession large sums of money and deposited the same in the National City Bank of Salt Lake City, Utah, which bank closed its doors on the 17th day of January, 1922, and went into the hands of said Edward E. Jenkins as Receiver appointed by the Comptroller of Currency of the United States Government; that at said time said County Treasurer and said County had on deposit with said bank, County funds in the sum of Six Hundred Forty Three Thousand Ninety-four and 29/100 Dollars ($643,094.29); that through payments made by certain companies which had furnished depository bonds, and through payment by the said American Surety Company of New York of the principal sum of Two Hundred Thousand Dollars ($200,000.00) and $23,362.13 interest and through payment of dividends by said Receiver, the claim of said County and said County Treasurer against said bank has been reduced to the sum of Forty-seven Thousand Six Hundred Sixty-six and 01/100 Dollars ($47,666.01); that when said County Treasurer and said County have received the further sum of Forty-seven Thousand Six Hundred Sixty-six and 01/100 Dollars ($47,666.01) on account of said deposit, together with such interest on said sum as has legally accrued as against the defendant herein, the claim of said County Treasurer and said County will have been paid in full.

90 V.

That on or about the 5th day of October, 1923, in due course of administration, the Comptroller of Currency of the United States regularly authorized and directed the defendant herein to pay a dividend of Ten per cent upon all claims that had been filed with the defendant and listed and approved by him; that at said time and prior thereto, the claim of said Salt Lake County and the Treasurer thereof, on account of said moneys deposited in said bank, had been approved by

said Receiver, and said Receiver had at the time of the declaration of prior dividends, caused payment of same to be duly made to said Salt Lake County and the County Treasurer thereof, at the same time that other creditors of said bank with approved claims had received dividend payments; that since the 5th day of October, 1923, the defendant, as Receiver of said bank, has had on hand and in his possession regularly declared and set apart as a dividend on the claim of said County and said County Treasurer, the sum of Fifty-six Thousand Eight Hundred Nine and 42/100 Dollars ($56,809.42) which he declines and refuses to pay over to said Salt Lake County and its said Treasurer, or to any persons whatsoever; that on the 5th day of October, 1923, the plaintiff American Surety Company of New York had not discharged and paid to the said Salt Lake County its liability aforesaid as surety upon the official bond of said County Treasurer; that on or about the 17th day of January, 1924, the plaintiff herein advised the defendant that said American Surety Company of New York was about to pay its said liability to said Salt Lake County, and requested and demanded that the defendant pay to said Salt Lake County and its said Treasurer, or to the plaintiffs herein jointly, the said dividend in order that an adjustment of accounts might be made between the plaintiffs herein; that the defendant declined to pay over the said dividend to the plaintiffs, or any of them, and has ever since declined and refused to pay over the same.

VI.

That when said Salt Lake County has received said Forty-seven Thousand Six Hundred Sixty-six and 01/100 Dollars ($47,666.01) and thereby has been fully paid and made whole on account of the moneys so deposited in said National City Bank of Salt Lake City, Utah, the America Surety Company of New York will be entitled, by operation of law, to be subrogated to the rights of the County and the County Treasurer, as against said National City Bank of Salt Lake City, Utah, and its said Receiver, by reason of the County moneys deposited in said bank, and will be entitled to payment to it of all moneys and dividends lawfully payable by said Receiver as dividends on account of said deposit until said American Surety Company of New York has been paid; that on or about the 29th day of February, 1924, by agreement and contract the said Salt Lake County and its said Treasurer, assigned to said American Surety Company of New York all their right, title and interest and claims as against said Na-

tional City Bank of Salt Lake City, Utah, on account of said deposit, and in and to said dividends on said deposit already declared and in the hands of said Receiver, save and except their right and claim in and to said Forty-seven Thousand Six Hundred Sixty-six and 01/100 Dollars ($47,666.01) of said moneys; a copy of which Assignment is hereto attached, marked Exhibit A and made a part hereof as fully as if set out at length at this point in this complaint herein.

Wherefore, Plaintiffs pray judgment against the said defendant as follows:

1. That it be ordered, adjudged and decreed that said defendant pay over immediately to said plaintiff the said dividend now held by him in the sum of Fifty-six Thousand Eight Hundred Nine and 42/100 Dollars ($56,809.42) together with interest thereon from the 5th day of October, 1923, said principal sum and interest to be distributed Forty-seven Thousand Six Hundred Sixty-six and 01/100 Dollars ($47,-666.01) and interest thereon from October 5th, 1923,
91 to said Salt Lake County, and the balance of Nine Thousand One Hundred Forty-three and 41/100 Dollars ($9,143.41) with interest thereon from the 5th day of October, 1923, to said American Surety Company of New York.

2. That it be ordered, adjudged and decreed that all further dividends accruing in the hands of the defendant by reason of the deposit of County funds in said bank, be paid over to said American Surety Company of New York, or its order, when and as dividends are directed and ordered to be paid by the Comptroller of Currency of the United States to other creditors of said bank until said American Surety Company of New York has been repaid in full for the losses sustained by it as surety upon the official bond of said County Treasurer.

3. That plaintiffs have their costs herein incurred.

GEORGE G. ARMSTRONG,
CHENEY, JENSEN, HOLMAN &
STEPHENS,
Attorneys for Plaintiffs.

State of Utah,
County of Salt Lake—ss.

William E. McKell being first duly sworn, deposes and says: That he is an officer, to-wit, Resident Vice-President

of the American Surety Company of New York, a corporation, one of the plaintiffs above named; that he makes this verification for and on behalf of said corporation; that he has read the foregoing complaint and knows the contents thereof; that the same are true of his own knowledge except as to matters therein stated upon information and belief, and as to such matters he believes it to be true.

WILLIAM E. McKELL.

Subscribed and sworn to before me this 10th day of March, 1924.

(Seal) ROSE SMITHERS,
Notary Public, Residing at Salt Lake City, Utah.

Filed in United States District Court, District of Utah, Mar. 10, 1924.

JOHN W. CHRISTY, Clerk.

Exhibit "A".

Assignment of Claim.

Whereas, E. J. Groesbeck, as County Treasurer of Salt Lake County, had on deposit in the National City Bank on the date when said bank passed into the hands of a receiver, the sum of Six Hundred Forty-three Thousand Ninety-four 29/100 Dollars ($643,094.29), and

Whereas, Said E. J. Groesbeck has heretofore made an assignment of all his rights to dividends of said bank on the sum of Seventy-five Thousand Dollars ($75,000.00) of said deposit, and

Whereas, The American Surety Company of New York has paid to said E. J. Groesbeck as Treasurer of said Salt Lake County, and to said Salt Lake County, the sum of Two Hundred Thousand Dollars ($200,000.00) as surety upon the official bond of said E. J. Groesbeck as said Treasurer of Salt Lake County, and

Whereas, Said Salt Lake County, has received from certain depository sureties and by way of dividends from said receiver further sums from time to time, and its claim against said receiver by reason of said deposit is now reduced to the sum of Forty-seven Thousand Six Hundred sixty-six and 01/100 Dollars ($47,666.01), and

Whereas, The receiver of said bank has on hand declared and set apart as a dividend payable on said claim, the sum of Fifty-six Thousand Eight Hundred Nine and 42/100 Dollars ($56,809.42), which he declines and refuses to pay over, and

92 Whereas, After the further payment to said Salt Lake County and its said Treasurer of the said balance of Forty-seven Thousand Six Hundred Sixty-six and 01/100 Dollars ($47,666.01), the American Surety Company of New York is entitled to be subrogated to the rights of said Treasurer, and of said County, and of said Treasurer in his individual capacity, on account of said deposit in said bank, as against said bank and is also entitled to an assignment of all the rights and claims of said County and said Treasurer in and to the Three Hundred Sixty Thousand ($360,000.00) Dollars par value of the bonds of the Crystal Lake Farms Company held by said Treasurer as collateral security for the payment of said moneys represented by said deposit.

Now, Therefore: For and in consideration of the premises and the sum of One Dollar, and other good and valuable considerations, the said E. J. Groesbeck, as Treasurer of Salt Lake County, by and with the approval of the County Commissioners of Salt Lake County, does hereby, and said Salt Lake County does hereby assign, transfer and set over unto the American Surety Company of New York, the surety on the official bond of said E. J. Groesbeck, as County Treasurer, all rights and claims of the said E. J. Groesback, as Treasurer of Salt Lake County, and of Salt Lake County, against said National City Bank on account of the balance of said deposit except only that it is agreed and understood that said Salt Lake County is first entitled to the payment to it of Forty Seven Thousand Six Hundred Sixty-six 01/100 ($47,66.01) Dollars of said moneys, and the undersigned do hereby request the receiver of said bank to make all further payments of moneys on account of liquidation dividends on said claim to said American Surety Company of New York, after said Salt Lake County has received in full said sum of Forty-seven Thousand Six Hundred Sixty-six 01/100 ($47,666.01) Dollars, and said E. J. Groesbeck as County Treasurer of Salt Lake County, and said Salt Lake County, do hereby assign, transfer and set over unto said American Surety Company of New York all its rights and claim in and to the Three Hundred Sixty Thousand ($360,000.00) Dollars par value of

the bonds of the Crystal Lake Farms Company held as security for the payment of said moneys represented by said deposit.

In Witness Whereof the said E. J. Groesbeck as County Treasurer of Salt Lake County has hereunto set his hand and seal, and Salt Lake County has caused this Assignment of Claim to be executed by the Chairman of its Board of County Commissioners, attested by its Clerk, this the 29th day of February, 1924.

(Signed) E. J. GROESBECK (Seal)
County Treasurer
Salt Lake County.

(County Seal) (Signed) SALT LAKE COUNTY
By E. L. Burgon
Chairman Board of
County Commissioners.

Attest:
(Signed) Clarence Cowan, Clerk.
(Signed) By Fred C. Bassett, Deputy Clerk."

Mr. Jensen: We desire to offer the answer of the Receiver, Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City, the answer and interpleader, commencing at page 7 of defendant's Exhibit 3, and continuing to page 12.

(The part of the former record designated and offered is in words and figures as follows:)

93 "Answer and Interpleader.

In the District Court of the United States, in and for the District of Utah, Central Division.

Salt Lake County, a subdivision of the State of Utah, E. J. Groesbeck, County Treasurer of said Salt Lake County, and American Surety Company of New York, a corporation, Plaintiffs,

No. 8069. vs. Law.

Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, a National Banking Association, Defendant.

Comes now Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, a National Banking Association, and for answer to the complaint of plaintiffs on file herein, admits, denies and alleges:

1. Admits paragraphs I, II and III of plaintiff's complaint.

2. Answering paragraph IV of plaintiffs' complaint defendant admits said National City Bank closed its doors and suspended business on the 17th day of January, 1922, and admits that on said day said E. J. Groesbeck, as Treasurer of Salt Lake County, Utah, had on deposit with said National City Bank the sum of $643,094.29.

3. Defendant alleges that prior to the failure of said National City Bank said bank had furnished to plaintiff County and to Groesbeck, its Treasurer, depository bonds to protect said deposit against loss by reason of failure of the bank; that one of said depository bonds so furnished was the bond of the Fidelity and Deposit Company of Maryland, in the sum of $75,000.00; that upon the failure of said bank said Seventy-five Thousand Dollar bond was immediately and fully paid to said county by said Fidelity and Deposit Company, whereupon said Groesbeck and said Salt Lake County, in compliance with the provisions of said depository bond assigned to said Fidelity and Deposit Company of Maryland, the claim of said Groesbeck and said Salt Lake County against said National City Bank of said deposit to the extent of $75,000.00, leaving a balance due to said County and said Groesbeck, its Treasurer, on account of said deposit, the sum of $568,094.29; that immediately thereafter the National Surety Company of New York and the Massachusetts Bonding and Insurance Company paid to said county and to said Groesbeck, its Treasurer, the sums of $125,000.00 and $25,000.00 respectively, being the full sums due from said companies on account of depository bonds furnished by said National Surety Company of New York and Massachusetts Bonding and Insurance Company; that in addition to said sums so paid on account of said claims of Salt Lake County, by said Surety Companies, this defendant has paid dividends to said Groesbeck and to said Salt Lake County on account of said claim amounting to the sum of $170,428.28, being 30 per cent of the amount of said county's claim.

4. Defendant admits that upon payment by the American Surety Company of New York to said Groesbeck and said County of the sum of $200,000.00 there is left due and owing on account of said claim of said county against the said National City Bank the sum of $47,666.01.

5. Answering paragraph V of said complaint defendant admits that on or about October 23rd, 1923, there became due and payable out of funds in his possession a dividend on account of the deposit of Salt Lake County's funds in said bank amounting to $56,809.42, being 10 per cent of the
94 claim on account of said deposit, which sum is now held by this defendant and which sum this defendant is ready and willing to pay over to whomsoever is lawfully entitled thereto.

6. Further answering said paragraph V defendant admits that on or about January 17, 1924, plaintiff American Surety Company of New York, told defendant it was about to discharge its liability amounting to $200,000.00, to Salt Lake County and defendant alleges that on said day the plaintiffs herein, fully understanding the claims of the National Surety Company of New York, the Massachusetts Bonding and Insurance Company and the American Indemnity Company of Galveston, Texas, against this defendant, which claims are hereafter fully set forth, agreed to furnish defendant with a good and sufficient bond indemnifying defendant against said claims if the defendant would pay over said sum of money to the plaintiffs; that defendant agreed to pay over said money to plaintiffs upon receipt of such indemnity bond but no such bond has ever been furnished.

7. Answering paragraph VI of plaintiffs' complaint, defendant admits that when Salt Lake County has been paid the further sum of $47,666.01, said County will have been fully paid and made whole on account of the funds so deposited in said National City Bank.

8. Further answering said paragraph VI this defendant does not know and has no way of determining except by the judgment of this court what person or persons are entitled to receive from this defendant said 10 per cent dividend amounting to $56,809.42 now held by this defendant, nor can defendant tell, in the absence of the judgment of this court, to what person or persons dividends which may hereafter accrue in the possession of defendant and become payable on account of the deposit. of Salt Lake County in said National City Bank, shall be lawfully payable.

Further answering said complaint and as a separate and additional defense, and by way of interpleader, this defendant alleges:

1. That defendant claims no right or interest in or to said 10 per cent dividend amounting to $56,809.42 and is ready

and willing to pay the amount thereof into this court or to such person or persons as this court may direct.

2. That the National Surety Company of New York is a corporation of the State of New York and at all times herein mentioned has been lawfully authorized to engage in the surety business within the State of Utah; that prior to the 17th day of January, 1922, the National Surety Company of New York furnished its depository bond in the sum of $125,000.00 to protect Salt Lake County against loss on account of its deposit of funds in the National City Bank of Salt Lake City; that upon the failure of said bank the National Surety Company of New York paid over to said County the sum of $125,000.00, being the penal sum of said depository bond, and said National Surety Company of New York now claims that upon the payment to Salt Lake County of said sum it became subrogated to the extent of its bond to the rights and claims of Salt Lake County or E. J. Groesbeck, its Treasurer, against said National City Bank and this defendant, as its Receiver, and that by reason thereof it has been ever since said payment and now is entitled to receive its pro rate share of any and all dividends paid by defendant on account of the deposit of said County money, and said National Surety Company of New York now asserts that ever since the 23rd day of October, 1923, has asserted that in as much as it has received no part of any of the dividends paid on account of said deposit of County funds it is now entitled to receive such portion of the sum of $56,809.42 now held by the defendant, as will pay its pro rata share of said deposit, and ever since said 23rd day of October, 1923, said National Surety Company has been demanding that this defendant pay over and deliver to it its share of said dividend.

3. That the Massachussetts Bonding and Insurance Company is a corporaion of the State of Massachusetts and at all times herein mentioned has been lawfully authorized to engage in the surety business within the State of Utah; that prior to the 17th day of January, 1922, the Massachusetts Bonding and Insurance Company furnished its depository bond in the sum of $25,000.00 to protect Salt Lake County against loss on account of its deposit of funds in the National City Bank of Salt Lake City; that upon the failure of said bank the Massachusetts Bonding and Insurance Company paid over to said county the sum of $25,000.00, being the penal sum of said depository bond and said Massachusetts Bonding and Insurance Company now claims that upon the payment to Salt Lake County of said sum it be-

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came subrogated to the extent of its bond to the rights and claims of Salt Lake County or E. J. Groesbeck, its Treasurer, against said National City Bank and this defendant, as its Receiver, and that by reason thereof, it has ever since said payment and now is entitled to receive its pro rata share of any and all dividends paid by defendant on account of the deposit of said County money, and said Massachusetts Bonding and Insurance Company now asserts and ever since the 23rd day of October, 1923, has asserted that in as much as it has received no part of any of the dividends paid on account of said deposit of county funds, it is now entitled to receive such portion of the sum of $56,809.42 now held by the defendant, as will pay its pro rata share of said deposit and ever since said 23rd day of October, 1923, said Massachusetts Bonding and Insurance Company has been demanding that this defendant pay over and deliver to it its share of said dividend.

4. Defendant is informed and believes that the National Surety Company of New York has assigned and transferred to the American Indemnity Company its claim against the National City Bank and this defendant to the amount of $5,000.00 and that said American Indemnity Company, as assignee of said National Surety Company of New York, claims an interest in and to all dividends declared on account of said deposit of Salt Lake County, and especially said American Indemnity Company claims an interest in and to the dividend now declared and withheld in the sum of $56,809.42.

5. That the said National Surety Company of New York, the Massachusetts Bonding and Insurance Company and the American Indemnity Company have been and now are threatening this defendant with suits to recover from defendant said dividend, and to otherwise vex and harass this defendant concerning the same; that defendant has at all times since the 23rd day of October, 1923, been ready and willing to deliver over to the person or persons lawfuly entitled to receive the same, the full amount of said dividend, but defendant has no means of knowing and is unable to determine the merits of the controversy or the respective rights in and to said dividend of the plaintiffs herein, and the other persons herein referred to as claimants of said dividend.

Wherefore, defendant prays that this court make and enter an order requiring the plaintiffs herein and the National Surety Company of New York, the Massachusetts Bonding and Insurance Company of Massachusetts and the American Indemnity Company of Galveston, Texas, to interplead to-

gether and set forth and litigate their rights among themselves concerning said dividend of $56,809.42, now held by this defendant, and that they be required to set forth and litigate their rights among themselves of any future dividends which may accrue and come into the possession of this defendant by reason of the deposit by Salt Lake County of said funds in the National City Bank; that upon payment into court of the amount of said dividend, to-wit, $56,809.42, this defendant be discharged from all liability in relation thereto and that it be hence dismissed with its costs expended herein.

BAGLEY, JUDD & RAY,
Attorneys for Defendant.

State of Utah,
County of Salt Lake—ss.

Edward E. Jenkins, being first duly sworn, deposes and says: That he is the defendant above named; that he has read the foregoing Answer and Interpleader, knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein set forth on information and belief, and as to those matters he believes it to be true.

EDWARD E. JENKINS.

96 Subscribed and sworn to before me this 22nd day of March, 1924.

(Seal) ELEANOR CAMERON
Notary Public. Residence: Salt Lake City, Utah.

Received copy of the foregoing answer and interpleader this 24 day of March, 1924.

CHENEY, JENSEN, HOLMAN & STEPHENS
Atttorneys for Plaintiff for American Surety Company of New York.

GEO. G. ARMSTRONG
Attorneys for Salt Lake County & E. J. Groesbeck.

Filed in United States District Court, District of Utah, Mar. 24, 1924, John W. Christy, Clerk."

Mr. Jensen: We offer the order of interpleader of the court appearing on page 13.

(The part of the former record designated and offered is in words and figures as follows:)

"Order directing Receiver of National City Bank to Pay Certain Money, etc.)

The parties hereto, by and through their respective attorneys, having, on this 28th day of March, 1924, in open court, made their stipulation, and the court having heard the same and being advised of the premises, it is therefore ordered:

1. That the defendant Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, pay unto the clerk of this court the sum of $56,809.42 on or before the 28th day of April, 1924, said sum to remain in the hands of the clerk abiding the orders and direction of this court.

2. That The National Surety Company of New York, a corporation of New York, authorized to do business within the State and District of Utah; and Massachuesetts Bonding and Insurance Company, a corporation of the State of Massachusetts, authorized to do business within the State and District of Utah; the American Indemnity Company, a corporation of the State of Texas, be and they are hereby ordered and commanded to interplead in this action and show cause, if any they have, why the money tendered into court in accordance with this order and claimed by the plaintiffs in their complaint on file herein, should not be forthwith paid to said plaintiffs.

Witness the hand of the court this 28th day of March, 1924.

(Signed) TILLMAN D. JOHNSON,
Judge.

"Filed in United States District Court, District of Utah, March 28, 1924. (Signed) JOHN W. Christy, Clerk."

Mr. Jensen: We offer the answer of the National Surety Company, commencing at page 14, and continuing to page 22, that is, with the exhibits; we are offering the exhibits that are part of the pleadings in each case.

97 (The part of the former record designated and offered is in words and figures as follows:)

"Answer of National Surety Company to Interpleader.

(Filed in U. S. District Court on May 14, 1924.)

Comes now the National Surety Company, a Corporation, interpleaded herein, and for its answer to plaintiffs' complaint, admits, denies and alleges as follows:

1. Admits paragraphs 1, 2, 3, 4 and 5 of plaintiffs' complaint.

2. Denies each and every allegation contained in paragraph 6 of said complaint.

Further answering said paragraph, the National Surety Company alleges that if such an assignment was made to said American Surety Company by Salt Lake County, the same is illegal, void, without authority of law and of no effect.

Replying to the so-called 'Separate And Additional Defense And Interpleader' of the defendant, Edward E. Jenkins, Receiver, the National Surety Company admits, denies and alleges as follows:

1. Admits paragraphs 1, 2, 3, and 4 of said so-called separate and additional defense and interpleader.

2. Denies paragraph 5 of said so-called separate and additional defense and interpleader.

In accordance with the order of interpleader made herein by the above entitled court, rquiring the National Surety Company to set forth its rights to said sum of $56,809.42, it alleges as follows:

1. That at all times herein mentioned, the National Surety Company of New York, was and is a corporation of the State of New York, and at all times herein mentioned, has been, now is, lawfully authorized to engage in the surety business within the State of Utah.

2. That at all times herein mentioned, Salt Lake County was and is, a county organized and existing under the laws of the State of Utah, with power to sue and be sued, and that the plaintiff, E. J. Groesbeck, was during all the times herein mentioned, and now is the duly elected, qualified and acting county treasurer of Salt Lake County, Utah, and as such, among other things, was required by the laws of Utah to receive all moneys belonging to the County, and all other public moneys by law directed to be paid to him, safely keep the same, and apply and pay out the same according to law, and

render an account as required by law, and to well, truly and faithfully perform all official duties required of him by law; and was further required by law to give a bond to Salt Lake County in the penal sum of $200,000.00 for the faithful performance of his official duties as such officer, and to secure the acounting for, safe keeping and application of all moneys or other property that came into his hands as such officer.

3. That on or about the 3rd day of January, 1921, the said E. J. Groesbeck as said County Treasurer, furnished and filed as provided by law, his official bond with the American Surety Company of New York thereon as surety, for the penal sum of Two Hundred Thousand ($200,000.00) Dollars, which was conditioned as follows:

'The Condition Of This Obligation Is Such, that Whereas, the above [bounded] principal has been duly elected to the office of County Treasurer in and for Salt Lake County, for a term beginning January 3rd, 1921.

'Now Therefore, if the said Edward J. Groesbeck shall well, truly and faithfully perform all official duties now required of him by law and also such additional duties as may be imposed on him by any law of the State, subsequently enacted, and if he shall account for and pay over and deliver to the person or officer entitled to receive the same, all moneys or other property that may come into his hands as such County Treasurer, then this obligation to be null and void, and of no effect; otherwise to be and remain in full force and virtue."

4. That the defendant, Edward E. Jenkins, is and
98 was during all the times herein mentioned since on or about the 17th day of January, 1922, the duly appointed and acting Receiver of the National City Bank of Salt Lake City, Utah; that the said National City Bank of Salt Lake City, Utah, was a national banking association duly organized and existing under and by virtue of the National Banking Act, with its office and principal place of business at Salt Lake City, Utah.

5. Alleges that the said E. J. Groesbeck, as such County Treasurer of Salt Lake County, collected and received for and in behalf of Salt Lake County, and the various school districts and cities therein, as well as the State of Utah, public funds in large amount, the exact amount of which is unknown to this defendant, and deposited the same in the National City Bank of Salt Lake City.

6. That prior to the 17th day of January, 1922, and to-wit: on the 3rd day of January, 1921, the National Surety Company of New York furnished its depository bond in the sum of $125,000.00 to protect Salt Lake County against loss in said amount on account of the deposit of its funds in the said National City Bank; that said bond was executed by the defendant, National Surety Company, at the request of said National City Bank and said E. J. Groesbeck.

7. That on the 17th day of January, 1922, said National City Bank closed its doors and went into the hands of defendant, Edward E. Jenkins, receiver, appointed by the Comptroller of Currency of the U. S., and at said time, said County Treasurer and said County had on deposit with said Bank, public funds belonging to the State of Utah, Salt Lake County and the various subdivisions thereof, in the sum of $643,094.29; that upon the failure of said bank, the National Surety Company of New York paid over to said Salt Lake County, the sum of $125,000.00 being the penal sum of its said depository bond, and by reason of its payment of said sum as aforesaid to Salt Lake County, it became by operation of law and is entitled to be subrogated to the amount of such payment to the rights and claims of Salt Lake County, and E. J. Groesbeck, its treasurer, against said National City Bank and this defendant, as its receiver; that by reason thereof, it has been ever since said payment, and now is, entitled to receive its pro rata share of any and all dividends to be paid by the defendant on account of the deposit of said County money. That said sum of $125,000.00 was paid by said National Surety Company to Salt Lake County and E. J. Groesbeck, its treasurer, and received by them without prejudice to the claim of said National Surety Company to subrogation pro tanto to the rights of Salt Lake County against said National City Bank and its receiver; said question being left open for future determination. That on or about June 5th, 1922, and prior to its payment of said sum of $125,000.00 to Salt Lake County, the National Surety Company, as a condition precedent to said payment, requested that the Board of County Commissioners of Salt Lake County pass a resolution to said effect, which resolution was thereupon duly passed prior to the receipt of said payment; that a copy of said resolution is hereto annexed, made a part hereof, and marked Exhibit "A". That on or about June 5th, 1922 and prior to its payment of said $125,000.00 the National Surety Company, as a condition precedent to said payment, requested and received from said E. J. Groesbeck a letter to the same effect, a true

copy of which letter is hereunto annexed, made a part hereof, and marked Exhibit "B".

8. That after the failure of said National City Bank on said 17th day of January, 1922, the National Surety Company learned for the first time that said E. J. Groesbeck had failed to comply with the provisions of Section 4500 Comp. L. of Ut. 1917, by requiring from said bank full and complete depository protection as required by said Section; and that the only depository bonds exacted or required by said Groesbeck of said National City Bank was the depository bond of the National Surety Company in the sum of $125,000.00, the bond of the Massachusetts Bonding Company in the sum of $25,000.00 and the bond of the Fidelity & Deposit Company of Maryland in the sum of $75,000.00, aggre-
99 grating in all the sum of $225,000.00; that said E. J. Groesbeck did, however, accept from said National City Bank $360,000.00 par value of bonds of the Crystal Lakes Farm Lands Company, which bonds at the time they were received by him were not, and at no time since have been worth as much as ten cents on the dollar; that the American Surety Company has asserted and claimed and now asserts and claims it is entitled to the said $360,000.00 par value bonds of the Crystal Lake Farm Lands Company, to the exclusion and injury of the defendant, National Surety Company, and is now endeavoring to and will sell the same for its own use and benefit unless restrained by this court.

9. That by reason of the failure of said E. J. Groesbeck to comply with the provisions of said Section 4500 Comp. L. of Ut. 1917, the plaintiff, the American Surety Company, the surety upon his said official bond, became liable to Salt Lake County for the full penalty of its bond in the sum of $200,000.00, which payment was resisted by it, and that thereupon, suit was instituted against it by Salt Lake County in the District Court of the Third Judicial District of Salt Lake County for the sum of $200,000.00 together with interest thereon from the date of demand; that judgment was thereafter duly rendered against said American Surety Company, and in favor of Salt Lake County, for the said sum of $200,000.00 and interest, and thereafter said American Surety Company appealed from said judgment to the Supreme Court of the State of Utah, which judgment was affirmed by the said Supreme Court in the month of February, 1924, and thereafter the said American Surety Company paid to Salt Lake County the said sum of $200,000.00 and interest; the said Supreme Court of the State of Utah holding in effect

that the loss of the funds of Salt Lake County was occasioned by the failure of E. J. Groesbeck, as County Treasurer, to perform the duty enjoined upon him by law, to require from the said National City Bank sufficient depository protection to fully protect the public funds so deposited by him, and holding and finding in effect, that said bond of the American Surety Company was, and is, a depository bond insuring the safe keeping of the funds of Salt Lake County.

10. The defendant, National Surety Company, further alleges that if the said E. J. Groesbeck had complied with said Section 4500 Compiled Laws of Utah 1917, his surety, the American Surety Company, would have suffered no loss; but that he failed to so comply with the law, and his surety, the said American Surety Company, knowingly suffered and permitted him to violate the said law as they well knew, that he did not have sufficient depository protection to cover the public funds so deposited by him in said Bank; that because of the failure of the said Groesbeck to take, and the failure of the said American Surety Company to require him to take sufficient depository protection, the American Surety Company suffered a loss, for which it now seeks to reimburse itself at the expense of the National Surety Company; that equity and good conscience will not permit the said American Surety Company to make use of such illegal and wrongful act on the part of its principal to establish a right to dividends to the exclusion of, or superior to that of the National Surety Company.

11. The defendant, National Surety Company, alleges that by reason of its payment of the obligation on its bond of $125,000.00 to Salt Lake County, it became, and is by reason of such payment and by operation of law, and in justice, equity and in good conscience, entitled to subrogation in said amount as against the receiver of its principal; and the American Surety Company is entitled to subrogation and reimbursement only as against its principal, the said E. J. Groesbeck, which right, it is enforcing; that this defendant, National Surety Company, has no remedy as against the said E. J. Groesbeck, but must look wholly for indemnity to the funds of its principal, the National City Bank.

12. This defendant further alleges that the said National City Bank, in its written application to this defendant for said depository bond in the sum of $125,000.00, and as
100 a consideration for the issuance of said bond, promised and agreed to hold the said National Surety Company harmless, and to indemnify and reimburse it for any

loss which it might sustain by reason of its execution of said bond and following its payment to Salt Lake County of the penalty of said bond in the sum of $125,000.00, the National Surety Company duly presented its claim in said amount arising out of said bond to said defendant receiver.

13. That heretofore, and prior to the commencement of this action, the National Surety Company duly transferred and assigned to the American Indemnity Company of Texas, a corporation, $5,000.00 of its claim of $125,000.00 hereinbefore set forth.

Wherefore, the defendant National Surety Company, prays that the above entitled court make its Order, Judgment and Decree as follows:

1. That the plaintiff, American Surety Company take nothing by reason of its complaint herein.

2. That it be Ordered, Adjudged and Decreed that the plaintiff American Surety Company, is not entitled to said sum of $9,143.41 of said dividend now declared and held by said receiver, or any part thereof, and further that it be Ordered, Adjudged and Decreed that said American Surety Company is not entitled to receive any dividends declared or accruing in the hands of said defendant receiver by reason of the deposit of said public funds in said bank.

3. That it be Ordered, Adjudged and Decreed that the said American Surety Company has no right, title, interest or claim whatsoever in and to the said Crystal Lakes Farm Lands Company bonds, or the proceeds thereof, or any part thereof.

4. That it be Ordered, Adjudged and Decreed, that the National Surety Company is entitled by subrogation and operation of law, to its pro rata share of said $9,143.41 of the dividends now declared and held by said defendant receiver together with its pro rata share of all dividends declared by the defendant receiver by reason of the deposit of said public funds in said bank together with its pro rata share of said Crystal Lake Farm Lands Company's bonds.

5. That the claim of the National Surety Company against said defendant receiver in the sum of $125,000.00 arising out of the promise and agreement of said National City Bank to indemnify and to hold said National Surety Company harmless and to reimburse it for any loss on account of its execution of said bond in the sum of $125,000.00 be allowed and approved and the defendant receiver ordered to pay to said National Surety Company dividends thereon.

6. That the defendant, National Surety Company, have its costs herein incurred.

7. That the court make such further and other order herein as may be just and equitable.

ARTHUR E. MORETON,
Attorney for Defendant
National Surety Company.

State of Utah,
County of Salt Lake—ss.

Fred E. Moreton, being first duly sworn on oath, deposes and says: That he is an officer, to-wit, Resident Assistant Secretary of the National Surety Company; as such officer he is its agent and makes this verification for and on its behalf; that he has read the above and foregoing answer; knows the contents thereof, and the same is true, except as to the matters therein alleged upon information and belief, and as to those matters he believes it to be true.

FRED A. MORETON.

Subscribed and sworn to before me this 13th day of May, A. D. 1924.

(Seal)

ARTHUR E. MORETON,
Notary Public. Residing at Salt Lake City, Utah.

My Commission expires Apr. 18, 1927.

Due and timely service of the foregoing answer admitted this 13th day of May, 1924.

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CHENEY, JENSEN, HOLMAN & STEPHENS
Attorneys for Plaintiff.

BAGLEY, JUDD & RAY,
Attorneys for Defendant,
Edward E. Jenkins, Receiver."

"Exhibit 'A'.

Resolution.

Resolved that for and in consideration of the sum of $125,000.00 to Salt Lake County in hand paid by the National Surety Company of New York City, hereinafter called the surety, the receipt of which is hereby acknowledged, Salt

Lake County does hereby release and discharge the said surety from all liability, claim or demand under its certain bond in which the National City Bank of Salt Lake City, Utah, is principal and it is surety, bearing date on or about January 3rd, 1921, in the penal sum of $125,000.00 in favor of E. J. Groesbeck, Treasurer of Salt Lake County, Utah, conditioned for the payment of moneys deposited in said bank as in said bond provided.

Be it further resolved that in accepting said payment as aforesaid, the question of the extent of subrogation of said National Surety Company to the rights of Salt Lake County is left open for future determination, and the said payment is received without prejudice to the claim of said Surety Company to subrogation pro tanto to the rights of Salt Lake County against said National City Bank and its Receiver, as said claim is not thereby conceded by said County, said question being left for future determination."

"Exhibit 'B'

E. J. Groesbeck,
Treasurer.

Salt Lake County
Treasurer's Office

Salt Lake City, Utah.
June 5th, 1922.

National Surety Company
115 Broadway
New York City, N. Y.

Gentlemen:

In receiving your check for $125,000.00 in full payment and discharge of all liability, claim or demand under your certain bond in which the National City Bank of Salt Lake City, Utah, is principal, and you are surety, bearing date of January 3rd, 1921, in the sum of $125,000.00 in favor of undersigned, conditioned for the payment of monies deposited in said bank as in said bond provided, it is understood that the question of the extent of your subrogation to the rights of the undersigned and of Salt Lake County, is left open for future determination; it being my contention that your Company is not entitled to subrogation until and in the event I have been first reimbursed in full to the extent of my entire claim against the National City Bank, and I understand that it is your contention that your Company is entitled to sub-

rogation pro tanto immediately upon payment to me of the above amount, regardless of whether or not I am first reimbursed in full.

Your payment is, therefore, made and received as aforesaid without prejudice to your rights or contention and the question of the extent of your subrogation is therefore left open for future determination.

Yours very truly,

E. J. GROESBECK,
Treasurer, Salt Lake County."

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102 Mr. Jensen: As I understand it, Mr. Moreton, the American Indemnity Company is not a party to this litigation?

Mr. Moreton: No.

Mr. Jensen: We desire to offer the answer of the American Surety Company of New York to the complaint in intervention of the National Surety Company of New York, commencing at page 33 and continuing to page 36.

(The part of the former record designated and offered is in words and figures as follows:)

"Answer of American Surety Company of New York to Complaint In Intervention of National Surety Company of New York.

Comes now the American Surety Company of New York, a corporation, one of the plaintiffs above mentioned, and answering the complainant in intervention of the National Surety Company of New York, admits, denies and alleges as follows:

I.

Answering paragraphs 1, 2, 3, 4 and 5 of the said complaint in intervention, this plaintiff admits the allegations therein contained.

II.

Answering paragraph 6 of the said complaint in intervention, this plaintiff admits and alleges that the National Surety Company of New York, on or about the 3rd day of January, 1921, as surety, and the National City Bank of Salt Lake City, as principal, executed and delivered to E. J.

Groesbeck, County Treasurer of Salt Lake County, his depository bond in the sum of $135,000.00 in connection with, and as an inducement for the deposit of county funds in said National City Bank of Salt Lake City, by said E. J. Groesbeck as County Treasurer of Salt Lake County. This plaintiff denies each and every other allegation in the said paragraph 6 contained.

III.

Answering paragraph 7 of the said complaint in intervention, this plaintiff admits and alleges that on the 17th day of January 1922, said National City Bank of Salt Lake City closed its doors and went into the hands of Edward E. Jenkins, as Receiver thereof, appointed by the Comptroller of Currency of the United States; and admits that at said time said E. J. Groesbeck, as County Treasurer of Salt Lake County, had on deposit with said bank public county funds in the sum of $643,094.29; and admits that upon the closing of said bank the National Surety Company of New York paid over to said County Treasurer and to said Salt Lake County, the sum of $125,000.00, being the penal sum of its said depository bond; and admits that a resolution of the Board of County Commissioners and the letter of E. J. Groesbeck recite that said payment was made by the said National Surety Company without prejudice to the rights of subrogation, if any, which it might have.

This plaintiff denies each and every other allegation in the said paragraph 7 contained.

IV.

Answering paragraph 8 of the said complaint in intervention, this plaintiff admits that the aggregate of depository bonds taken by the said E. J. Groesbeck, as County Treasurer of Salt Lake County, in connection with the deposit of county funds in said National City Bank of Salt Lake City, as aforesaid, was $225,000.00; and admits that said E. J. Groesbeck, as such County Treasurer, did take, as further securities and protection for said funds, the sum of $360,000.00
103 par value of the bonds of the Crystal Lake Farm Lands Company; and plaintiff further admits and alleges that it has asserted and claimed, and now asserts and claims that its rights of subrogation as against said bonds and as against the funds of said National City Bank of Salt Lake City, are prior and superior to the rights and claims of the depository sureties including said National Surety Company of New York.

This plaintiff denies each and every other allegation in the said paragraph 8 contained.

V.

Answering paragraph 9 of the said complaint in intervention, this plaintiff admits that on account of the failure of said National City Bank, having on deposit the said public funds, this plaintiff became liable to Salt Lake County for the full penalty of its bond of $200,000.00, and for interest thereon from the date of demand; admits that suit was instituted against it for the recovery of same, and that judgment was had against it for said sum and interest; that it appealed from the said judgment to the Sureme Court of the State of Utah; that said judgment was affirmed and that thereupon and thereafter it paid to said Salt Lake County the said sum of $200,000.00 and interest.

This plaintiff denies each and every other allegation in said paragraph 9 contained.

VI.

Answering paragraphs 10 and 11 of said complaint in intervention, this plaintiff denies that said E. J. Groesbeck, as County Treasurer of Salt Lake County, failed to comply with the provisions of Section 4500 Compiled Laws of Utah, 1917, and denies that this plaintiff knowingly permitted or acquiesced in the violation of said or any law pertaining to the duties of his said office; and denies each and every other allegation therein contained except as the same are otherwise herein specifically admitted or qualified.

VII.

Answering paragraphs 12 and 13 of said complaint in intervention, this plaintiff alleges that it has no knowledge or information sufficient to form a belief as to the truthfulness of the allegation therein contained, and therefore and upon that ground denies the same.

VIII.

This plaintiff denies each and every allegation in the said complaint in intervention contained not hereinabove specially admitted, denied or qualified.

Wherefore, having fully answered the said complaint in intervention, this plaintiff prays that said National Surety Company of New York take nothing by reason of its said com-

plaint in intervention; that plaintiffs have judgment herein in accordance with the prayer of their complaint; and this plaintiff prays for such other further or different relief as to this court may seem just and equitable in the premises.

CHENEY, JENSEN, HOLMAN & STEPHENS
Attorneys for Plaintiff, American Surety Company of New York.

State of Utah,
County of Salt Lake—ss.

W. E. McKell, being first duly sworn, deposes and says: That he is an officer, to-wit: Resident Vice-President of the plaintiff corporation American Surety Company of New York, and makes this verification for and on its behalf; that he has read the foregoing Answer and knows the contents thereof; that the same is true to his best knowledge, information and belief.

W. E. McKELL

Subscribed and sworn to before me this 22 day of May, 1924.

L. E. BEUSCHELL,
(Seal) Notary Public Salt Lake City.

Copy of the foregoing Answer of American Surety Company of New York received this 22 day of May, 1924.

ARTHUR E. MORETON
Attorney for Defendant.

Filed in United States District Court, District of Utah. May 23, 1924. John W. Christy, Clerk."

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104 Mr. Jensen: We also desire to offer that part of the record commencing at page 97 of Exhibit 3, Exhibit 15 being the claim and Exhibit 16 being the claim and correspondence in connection therewith which was submitted to Mr. Jenkins, the Receiver of the National City Bank, and all that testimony following on page 97 and extending over to the bottom of page 105.

(The part of the record designated and offered is in words and figures as follows):

"Mr. Moreton: We offer in evidence what is marked Exhibit 15, National Surety Company, the same being a letter

of date August 7, 1923, from the National Surety Company to the Receiver of the National City Bank, and the reply of the Receiver to that letter, marked Exhibit 16, of date August 21, 1922.

Mr. Jensen: I understand you are offering these merely to show that you made a claim to the Receiver?

Mr. Moeton: Merely to show that we made a claim to the Receiver, and the time.

Mr. Jensen: For that purpose I have no objection.

The Court: May be received.

Exhibit 15 on the letter head of the National Surety Company, dated August 7th 1923, and attached papers offered by the defendant, National Surety Company, and received in evidence:

'In Re Bond #3206907—Cl. #20466
National City Bank
Salt Lake City, Utah.

'Receiver of the National City Bank,
Salt Lake City, Utah.

Gentlemen:

'Find enclosed our Proof of Claim against the National City Bank in the amount of $125,051.00. I am attaching thereto copy of original vouchers, copy of assignment and other papers that will substantiate our claim.

Will you please acknowledge receipt of this Proof of Claim and advise us if there is any other data that is required to satisfy your wishes?

Yours very truly,

SURETY SALVAGE DEPARTMENT
By L. C. Kelly.'

'Exhibit A.

National Surety Company,

Payee E. J. Groesbeck, as Treasurer of Salt Lake County, Address, Salt Lake City, Utah.

3/29/22 In full payment of all liability of National Surety Company under its bond dated January 3, 1921, for $125,-000.00 covering the funds of the county

of Salt Lake, Utah, on deposit in the National City Bank, Salt Lake City, Utah; it being understood by this payment the said National Surety Company is subrogated to all of said County's right, title and interest and claim of, in, to or upon the said deposit to the amount of the payment herein made....$125,000.00

105 In re: Bond 3206907—Claim—20466—
National City Bank, Salt Lake City.

Expenditure

authorized Examined by acctg. Dept. approved Entered A. M. Birdsall, J. T. M. W. J. D. E. A. St. J. Mertz. M. O. G. A. J. S.

No. 260616 New York, Mar. 30, 1922, $125,000.00

When endorsed on back, this voucher becomes a check for One Hundred Twenty Five Thousand And 00/100 * * * Dollars

In full for account as noted above.

Payable at
The National City Bank
Of the City of New York New York.

.....
Vice President.

A. H. MIDDLETON
Assistant Secretary Treasurer.

(Reverse Side of Check)

National Surety Company.
Voucher Check.

The endorsing of this voucher check constitutes a receipt in full for account as shown on reverse side. Make all endorsements below.

For deposit to the credit
of the account of the payee

(Stamp)

Pay National City Bank of
New York, or Order
June 1-1922
National Surety Company
by Joel Rathbone
Vice President

(Stamp)

Received Payment
June 1, 22
The National City Bank of N. Y.
Head Office

'E. J. Groesbeck Treasurer

Salt Lake County
Treasurers Office.
Salt Lake City, Utah.

For and in Consideration of the sum of One Hundred Twenty-five Thousand ($125,000.00) Dollars to E. J. Groesbeck as Treasurer of the County of Salt Lake, Utah, hereinafter called the 'Treasurer,' in hand paid by the National Surety Company of New York, N. Y., hereinafter called the 'Surety', the receipt of which is hereby acknowledged, the said County Treasurer does hereby release and discharge the said Surety from all liability, claim or demand under its certain bonds, in which the National City Bank of Salt Lake City, Utah, is principal and it is surety, bearing date on or about January 3, 1921, in the penal sum of One Hundred Twenty-five Thousand ($125,000.00) Dollars, in favor of E. J. Groesbeck, Treasurer of Salt Lake County, Utah, conditioned for the payment of monies deposited in said bank as in said bond provided.

106 In witness Whereof the said County Treasurer has hereunto set his hand and affixed his seal this 10th day of June, 1922, in duplicate.

E. J. GROESBECK
As Treasurer of the County of Salt Lake, Utah.

State of Utah
County of Salt Lake—ss.

On this 10th day of June, 1922, before me personally came E. J. Groesbeck, to me personally known and known to me to be the County Treasurer of Salt Lake County, Utah, and the same individual described in and who executed the foregoing instrument, and he thereupon acknowledged to me that he had executed the same.

V. P. HISKEY

State of Utah,
County of Salt Lake—ss.

E. J. Groesbeck, being first duly sworn on oath says: I am the County Treasurer of Salt Lake County, State of Utah, and as such official I caused the funds of said County to be deposited in the National City Bank of Salt Lake City, Utah, and took depository or security bonds from various companies providing for the payment of the moneys so deposited when required by him.

That among the companies giving such bonds was the National Surety Company of New York, City, New York, which gave its bond in the sum of One Hundred Twenty-five Thousand ($125,000.00) Dollars, effective January 3rd, 1921.

The National City Bank of Salt City closed its doors and suspended payments on Tuseday, January 17th, 1922, and since then has failed to have forthcoming, when required by him the moneys so deposited by him in said bank.

That the amount deposited by said E. J. Groesbeck as such County Treasurer of Salt Lake County at the time when said bank closed its doors and suspended payments was $598,117.98.

E. J. GROESBECK
County Treasurer

Subscribed and sworn to before me this 20th day of January, A. D. 1922.

LILA FOLSOM
Notary Public
Residing in Salt Lake City, Utah.'

'Jos. Wirthlin
Chairman

Salt Lake County
Commissioner

E. L. Burgon
S. J. Lindsay

Salt Lake City, Utah
June 5th, 1922.

National Surety Company of New York City
#115 Broadway
New York City, N. Y.

Dear Sir:

The Board of County Commissioners, at the meeting held this date, passed the following resolution:

'Commissioner S. J. Lindsay moved the adoption of the following Resolution:

Resolution.

'Resolved that for and in consideration of the sum of One Hundred Twenty-five Thousand Dollars ($125,000.00) to
Salt Lake County, State of Utah, in hand paid by the
107 National Surety Company of New York City, State of
New York, hereinafter called the surety, the receipt of which is hereby acknowledged, Salt Lake County, State of Utah, does hereby release and discharge the said surety from all liability, claim or demand under its certain bond in which the National City Bank of Salt Lake City, Utah, is principal and it is surety, bearing date on or about January 3rd, 1921, in the penal sum of One Hundred Twenty-five Thousand Dollars ($125,000.00) in favor of E. J. Groesbeck, Treasurer of Salt Lake County Utah, conditioned for the payment of moneys deposited in said bank as in said bond provided.

Be it Further Resolved that in accepting said payment as aforesaid, the question of the extent of subrogation of said National Surety Company to the rights of Salt Lake County, Utah, is left open for future determination, and the said payment is received without prejudice to the claim of said Surety Company to subrogation pro tanta to the rights of Salt Lake County against said National City Bank and its Receiver as said claim is not hereby conceded by said County, said question being left for future determination.

Commissioner E. L. Burgon seconded the motion of Commissioner S. J. Lindsay for the adoption of the foregoing Resolution and said Resolution on being put to a vote was adopted and passed by the Board of County Commissioners of Salt Lake County, State of Utah, the vote on roll call being as follows: Commissioner E. L. Burgon voting 'Aye'; Commissioner S. J. Lindsay voting 'Aye'; Commissioner Joseph Wirthlin voting 'Aye'.'

Passed by the Board of County Commissioners of Salt Lake County, State of Utah, this 5th day of June, A. D. 1922.

Yours very truly,

BOARD OF COUNTY COMMISSIONERS,
of Salt Lake County, State of Utah.

CLARENCE COWAN,
Clerk.
By Ida M. Holihan, Deputy Clerk.'

'In the Matter of the Estate of the National City Bank of Salt Lake City, Utah.

State of New York,
County of New York—ss.

Upton Slingluff of #115 Broadway, Burough of Manhattan, City of New York, deposes and says that he is Vice-President of the National Surety Company, a corporation, incorporated and existing under and by the laws of the State of New York, and carrying on business at #115 Broadway, Bourough of Manhattan, City and County of New York, and that he is duly authorized to make this Proof and says further that the said National City Bank of Salt Lake City, Utah is justly and truly indebted to the National Surety Company in the sum of One Hundred Twenty-five Thousand and Fifty-one and 00/100 ($125,000.00) Dollars and that the consideration for said debt is as follows:

That on or about the 1st day of January, 1921, the National Surety Company executed its bond #3206907 in the sum of $125,000.00 in behalf of the National City Bank of Salt Lake City, Utah, and in favor of the County Treasurer, at that time Edward Groesbeck, County Treasurer of Salt Lake County, Utah.

That the above bond was conditioned that the National City Bank, Salt Lake City, Utah, should at all times safely keep and have forthcoming when lawfully required all moneys of the said Obligee deposited with the said depository in the amount of One Hundred Twenty-five Thousand And 00/100 ($125,000.00) Dollars; that the said National City Bank of Salt Lake City, Utah upon demand by
108 the County Treasurer of Salt Lake County, Utah, failed to pay said sum upon demand as above set forth according to the terms of the bond; that the amount of the deposit was One Hundred Twenty Five Thousand and 00/100 ($125,000.00) Dollars and that the said Bank on or about the 17th day of January, 1922 closed its doors for business and thereafter failed to make said payment and because of its failure to pay the National Surety Company, pursuant to the terms of the said bond referred to, was obliged to and did pay to the obligee above set forth the amount of its deposit at that time in the National City Bank of Salt Lake City, Utah, as more fully appears from the attached copy of said voucher check marked Exhibit 'A' and made a part of this Proof of Claim; that on or about the

17th day of June, 1922, the National Surety Company paid the sum of Fifty-one and 00/100 ($51.00) for services brought about by the failure of this Bank, said sum of money being entirely up to the National City Bank of Salt Lake City, Utah which relieved the National Surety Company of the expenses incurred by reason of failure to car(—) bond, all of which latter sum of money more fully appears from attached copy of voucher check marked Exhibit 'B' and made part of this Proof of Claim.

That upon said payment of the above sums the National Surety Company became subrogated to the rights of the County Treasurer of Salt Lake County, Utah against the National City Bank of Salt Lake City, Utah, having about that time received assignment from the County Treasurer, Salt Lake City, Utah for the sum of One Hundred Twenty-five Thousand and 00/100 ($125,000.00) Dollars, the amount on deposit with said National City Bank of Salt Lake City, Utah. Copy of said assignment is attached hereto and marked Exhibit 'C' and made a part of this Proof of Claim.

That we attach herewith also copy of resolution by the Board of County Commissioners marked Exhibit 'D'. Also photostatic copies of other data of value in filing our Proof of Claim.

That no note has been received for said debt or any judgment recovered thereon; that no part of said debt has been paid; that there are no set-offs or counter-claims of same; that the National Surety Company has not nor has any person by its order or to the knowledge of the deponent for its use had or received any manner of securities for said debt whatsoever.

That the said National Surety Company demands that they be subrogated to the rights of the Obligee on the above mentioned bond against the funds or estate of the National City Bank of Salt Lake City, Utah, to the extent of One Hundred Twenty Five Thousand Fifty-one and 00/100 ($125,051.00) Dollars being the total amount set forth as having been paid by the National Surety Company to the Obligee and that it be reimbursed for the payment heretofore made to the Obligee as above set forth.

NATIONAL SURETY COMPANY
By Upton Slingluff, Vice President.

Sworn to before me this 4th day of August, 1922.

WM. M. WEAVER
Notary Public of New York
County, New York.'

L. C. K.

Mr. Moreton: Attached to Exhibit 15 is a photographic copy of a check for $125,000.00 release signed by E. J. Groesbeck; certificate signed by County Clerk of Salt Lake County addressed to the National Surety Company; a photographic copy of the bond is attached. I have heretofore introduced a copy of the bond, but it bore no signature. This one is a photographic copy of the original signatures. Then the claim itself, wherein it is recited that claim is made against the National City Bank for reimbursement and for subrogation.

109 Exhibit 16 was offered by the National Surety Company, and was received in evidence and is as follows:

'The National Surety Company
115 Broadway, New York City.

Gentlemen:

Re: Bond #3206907—Cl. #20466—

National City Bank, Salt Lake City, Utah.

I have yours of the 7th instant, enclosing Proof of Claim against this Trust, in the amount of $125,051.00, together with photographic copies of original vouchers, assignment and other papers in substantiation of your claim.

You may be advised that I have noted upon the books of this Receivership the facts of your payment of the sum of $125,000.00 under your bond, to E. J. Groesbeck, Treasurer of Salt Lake County.

Mr. Groesbeck advises me that he did not endorse the check, copy of which you enclose, marked Exhibit A, and I cannot find any evidence of his endorsement on the copy which you enclose. He states that payment was made without reference to the question of subrogation, that being left open for future determination. I cannot, therefore, recognize your claim as entitling you to dividends until Mr. Groesbeck shall have been reimbursed in full for his claim on this trust.

Your claim for attorney's fees, and expenses paid to Mr. Arthur E. Moreton in the sum of $51.00, is rejected. Mr. Moreton is the County Attorney of Salt Lake County, and it seems to me that services rendered by him in this regard are not a proper charge against this trust.

Very truly yours,

EDW. E. JENKINS,
Receiver."

Mr. Jensen: Mr. Moreton, in the interest of time, I suppose it may be stipulated that these pleadings I have referred to were the pleadings filed by the respective parties to the present litigation in the prior suit in this Court to which I have referred, that the claim was presented as is shown, as you proved at the prior trial, and that the claim is the claim made by the National Surety Company at that time, and that the letter is the letter of Mr. Jenkins acknowledging the receipt of that claim and reply thereto.

Mr. Moreton: Yes.

The Court: Isn't that the same claim you have introduced here?

Mr. Jensen: No, another claim has been filed here, your Honor.

Mr. Jensen: We also desire to offer the decree of this Court in the case that was tried, the pleadings to which have just been referred to, which appears at page 47 and continues over to the bottom of page 48.

110 (The part of the former record designated and offered is in words and figures as follows:)

"Decree June 12, 1924.

"In The District Court of The United States In And For The District Of Utah Central Division.

Salt Lake County, a subdivision of the State of Utah, E. J. Groesbeck, County Treasurer of said Salt Lake County, and American Surety Company of New York, a corporation, Plaintiffs,

No. 8069. vs. Law. (Equity)

Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, a national Banking association, Defendant.

National Surety Company of New York, a corporation, American Indemnity Company, a corporation, and Massachusetts Bonding & Insurance Company, a corporation, Interpleaded Defendants.

This cause came on regularly for trial on the 28th day of May, 1924, before the Honorable Tillman D. Johnson, Judge of the above entitled court. And the court having heard the evidence in behalf of all of the parties hereto, and the cause having been argued and submitted for decision, and the court being fully advised in the premises does hereby find the issues in favor of the plaintiffs, and thereupon it is ordered, adjudged and decreed as follows:

(a) That the plaintiff, Salt Lake County, have and recover from Edward E. Jenkins, Receiver of National City Bank, the sum of $47,666.01.

(b) That the plaintiff, American Surety Company of New York, have and recover from Edward E. Jenkins, Receiver of National City Bank, the sum of $9,143.41, being the balance of a dividend declared and payable on the claim of Edward J. Groesbeck, as Treasurer of Salt Lake County, against said bank, after payment of the sum hereinabove ordered to be paid to Salt Lake County.

(c) The plaintiff, American Surety Company of New York, be and it is subrogated to and entitled to succeed to the rights of said Edward J. Groesbeck, as Treasurer of Salt Lake County, and of Salt Lake County to all dividends that may become payable on the claim in the sum of $568,094.29, of said Edward J. Groesbeck, as Treasurer of Salt Lake County against said National City Bank, and is subrogated to and entitled to succeed to the rights of said Edward J. Groesbeck, as Treasurer of Salt Lake County, and of Salt Lake County, in the bonds of Crystal Lake Lands Company of the par value of $360,000.00, held by said Edward J. Groesbeck as collateral security for the deposit of said moneys in said National City Bank, until said American Surety Company of New York shall have received on account of said dividends and/or the proceeds of said bonds the total sum of $223,362.15, with interest at the rate of eight per cent per annum on the principal sum of $200,000.00 from the 29th day of February, 1924, until paid; and said Edward E. Jenkins, as Receiver of National City Bank, or any receiver of said bank, is hereby ordered and directed to pay to said American Surety Company of New York all said future dividends as the same are declared and payable on said claim against said bank until said American Surety Company of New York shall have received the amounts aforesaid; and said American Surety Company of New York

is hereby authorized to sell and/or otherwise dis-
111 pose of said bonds, and to apply the proceeds thereof toward the repayment of said amounts as aforesaid.

(d) That after said American Surety Company of New York shall have received dividends and/or proceeds from said bonds sufficient to repay to it the said sum of $223,362.15, with interest at the rate of eight per cent per annum on the principal sum of $200,000.00 from the 29th day of February, 1924, until paid, then the interpleaded defendants, National Surety Company of New York, American Indemnity Company and Massachsusetts Bonding & Insurance Company, shall participate pro rata in all further dividends declared and payable on said claim and/or all balance of proceeds from the sale or other disposition of said Crystal Lake Farm Lands Company bonds, until the amount of the claims of said interpleaded defendants, as shown by their complaints in intervention, are paid in full, and any balance thereafter remaining shall belong to the Receiver of said National City Bank.

(Signed) TILLMAN D. JOHNSON,
Judge.

Copy of the foregoing Decree received this 10th day of June, 1924.

BAGLEY, JUDD & RAY,
Attorney for Edward E. Jenkins, Receiver, Massachusetts Bonding & Insurance Co.

A. E. MORETON,
Attorney, National Surety Company of New York, American Indemnity Company.

GEORGE G. ARMSTRONG,
Attorney for Salt Lake County.

Filed in United States District Court, District of Utah, Jun 12, 1924, John W. Christy, Clerk."

Mr. Jensen: I have here a certified copy of the decision of the Circuit Court of Appeals in the same cases on appeal, that is for the case 6819, being the appeal by the National

Surety Company, and 6820, being the appeal by the American Indemnity Company. I desire to offer that.

(Said document marked Exhibit 4.)

(Exhibit 4 is in words and figures as follows:)

(Opinion.)

"United States Circuit Court of Appeals, Eighth Circuit.
December Term, A. D. 1924.

National Surety Co., Appellant,
No. 6819. vs.
Salt Lake County, et al., Appellees.

Appeal from the District Court of the United States for the District of Utah.

112 December Term, A. D. 1924.

American Indemnity Co., Appellant,
No. 6820 vs.
Salt Lake County, et al., Appellees.

Appeal from the District Court of the United States for the District of Utah.

Mr. Arthur E. Moreton, for appellants.

Mr. John Jensen (Mr. A. M. Cheney, Mr. Frank E. Holman, Mr. L. R. Martineau, Jr., and Mr. Harold M. Stephens, were with him on the brief), for appellees.

Before Lewis, Circuit Judge, and Van Valkenburgh and Faris, District Judges.

Faris, District Judge, delivered the opinion of the Court.

These cases involves the question of appellants' right to share by way of subrogation, in certain dividends in the hands of one Jenkins, and accruing from assets, which came into the hands of Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, which failed on the 17th day of January, 1922; as also the right of appellants to participate in the proceeds of certain securities in the hands of one Groesbeck. The situation and status of the parties, so far as the pleadings and the manner in which, severally, these parties got into court are concerned, are not important; but some of the facts are necessary to an understanding of the case and to its decision.

Groesbeck was the County Treasurer of Salt Lake County, Utah, and as such, executed and delivered to Salt Lake Coun-

ty on the 3rd day of January, 1921, an official fidelity bond in the sum of $200,000, with the American Surety Company as surety therein. In this bond, as aforecast above, Salt Lake County, Utah, was the obligee.

Under the permissive provisions of Sec. 4500 Comp. Laws of Utah, 1917, Groesbeck deposited the money of Salt Lake County, which came to his hands as County Treasurer, in the National City Bank, and of such funds, so held by him, there was on deposit when the bank failed, the sum of $643,094.29. The statute mentioned may be important to an understanding and disposition of the contention urged pro and con by the parties. It reads thus:

'Any public officer having public funds in his custody may deposit the same, or any part thereof, with any bank incorporated under the national banking act and doing business in this state, or with any bank or trust company incorporated under the laws of and engaged in business in this state; provided, that he requires such depository to pay interest on all funds so deposited at a rate of not less than 2 per cent per annum, and that he take from such depository collateral security or a good and sufficient surety company bond or personal bond approved by him and sufficient in amount to fully protect such funds; provided, that the cost of any official bonds required to be furnished by any public treasurer shall be paid out of the funds in the respective treasuries; provided, that the interest received under the provisions of this title by the state treasurer shall be placed in the general fund. (Sec. 4500, Comp. Stats. 1917).'

Pursuant to the provisions and conditions of the above section, Groesbeck took from the National City Bank a surety bond with the bank as principal and the appellant National Surety Company, as surety, in the sum of $125,000, and a like bond from the Fidelity and Deposit Co., in the sum of $75,000, as also a similar bond of the Massachusetts Bonding and Insurance Co., in the sum of $25,000; in each of which
113 bonds, 'Groesbeck, Treasurer of Salt Lake County, Utah', was the obligee. The Bank also put up with Groesbeck, as collateral security to further secure the payment by the bank of the money deposited therein by him as such treasurer, $360,000.00 par value of the bonds of the Crystal Lake Farms Company.

The bond of the Fidelity & Deposit Co. contained an express provision, that on the payment by it of the sum of $75,000 the amount for which it became liable as a surety, it

should receive dividends, pro rata with other creditors, out of the assets of the bank. Such dividends it has gotten and is now getting, pursuant to an assignment to it by Groesbeck and it is not complaining here. The bond executed by appellant National Surety Company had no express provision as to subrogation. The Massachusetts Bonding and Insurance, for some reason, not necessary to state, even if it were known, does not complain here.

Salt Lake County has been paid in full thus: By National Surety Company, appellant, $125,000; by Massachusetts Bonding & Insurance Co., $25,000; by Fidelity & Deposit Co., $75,000, (all paid to Groesbeck for the benefit of Salt Lake Co.); by the American Surety Co. $200,000, (paid to Salt Lake Co., obligee therein, on the fidelity bond of Groesbeck); by the sum of $170,428.28, being a 30% dividend, paid to the County by the bank's receiver, and by the sum of $47,666.01, out of a further dividend of $56,809.42, in the hands of the receiver, and now apportionable. The County's right to this sum of $47,666.01, out of the dividend now apportionable, is, it is said in the brief of appellant National Surety Co., conceded. So there are left in dispute here, only the balance of this dividend, to-wit, $9,143.41, plus participation in future dividends if any, and whatever sum may be derived from the sale of the Crystal Lake Farms bonds, the par value of which is $360,000; actual value, neither clear nor important. These bonds were assigned by Groesbeck to the American Surety Co., between whom and appellant National Surety Co. the contest here is waged. The right of American Indemnity Co., appellant in Case No. 6820, is a derivative one, dependent wholly upon recovery by the National Surety Company; so, no further reference need be made as to it, or as to its appeal till the end of the discussion.

The single question is, whether, upon the facts stated, the law and equities give these remaining dividends and the proceeds of the Crystal Lake Farms bonds, after the county has been paid in full, to the appellant National Surety Co. or to the appellee, American Surety Co. The learned trial Court held, that the American Surety Co. is entitled to all funds derived and to be derived from such dividends and bonds, till it shall have been paid the sum of $223,362.15, the total sum paid by it on its fidelity bond, including interest, and with interest on the basic sum, at the rate of 8%, from February 29, 1924, and that the appellant, National Surety Co., shall be postponed in participation in such funds till the appellee, American Surety Co., shall have been paid in full.

The correctness of this decree is assailed by appellant, and such correctness of it is in various allegations assigned as error, for that it is contrary to law and equity.

It is conceded by counsel for appelleee that the money which Groesbeck deposited in the bank was held by him in trust, for Salt Lake County; but it is insisted by appellee that the situation and the conditions of the several bonds and the legal obligations created thereby, had the ultimate effect to make Groesbeck the debtor of the county, and to make the bank the debtor of Groesbeck. In short, that when Salt Lake County turned over to Groesbeck the sum of $643,000 (in round sum) Groesbeck became indebted to the County in that sum, and when Groesbeck deposited this same $643,000 in the bank, the latter became indebted to Groesbeck in that sum. From this premise it is insisted that it follows that Groesbeck, having taken some precaution to secure the payment back to him by the bank of this $643,000, in that he required his debtor to give a bond with the National Surety Co. and others as sureties, and to put up as further security bonds of the Crystal Lake Farms Co., is entitled to be paid in full, either by the bank from the dividends out of its wrecked assets, from the bonds of the depository sureties, or from the collateral securities in his hands, or, if so much shall be required, from all these several sources. And that when
114 Groesbeck shall have been paid in full by the bank, or its sureties (the appellant, and its associates on the depository bonds) then Groesbeck will owe the appellee, American Surety Co., such sums as it shall have been compelled to pay for him as a guarantor, or surety for his fidelity. Appellants, in effect, contend contra.

The correctness of this insistence seems plausible if not indisputable. But the contention is strenuously made by appellants that the County, the cestui que trust, have been paid in full, what remains should be equally divided between those who thus made the county whole. We think this contention, in a manner begs the question, for that it leaves out of consideration the conceded fact that appellant, National Surety Co., and its associates, the so-called depository sureties, did not pay by $200,000 all that the bank owed to Groesbeck, or that Groesbeck owed to the County, though concededly they did pay the full sums of their several obligations. The appellee, American Surety Co., under its direct obligation to the county, paid the county the sum of $200,000, with interest, and

the dividends and the Crystal Lake Farms bonds now here in dispute, are to the extent of $200,000 relieved from use to that end.

The rule applicable to this situation seems to be fairly well settled. The rule is that 'The right of subrogation cannot be enforced until the whole debt is paid. And until the creditor is wholly satisfied there ought to be and can be no interference with his rights and his securities which might, even by bare possibility, prejudice and embarrass him in any way in the collection of the residue of his claim.' (New Jersey Etc. R. R. vs. Wartendyke, 27 N. J. Eq. 658.)

To the same effect is the case of Knoffl vs. Knoxville Etc. Co., 182 S. W. 232, wherein it is said, 'A surety is not entitled to subrogation until the debt is paid in full, the creditor in the meantime is left in control of the debt and all the remedies for collection. A pro tanto assignment, or subrogation will not be allowed. The reason is that subrogation is a creature of equity and will never be allowed to the prejudice of the creditor. Harlan vs. Sweeny, 1 Lee 686; Gillian vs. Esselman, 5 Sneed 86; 37 Cyc. 408.'

The confusion in the case at bar arises from a mistaken view as to the identity of the actual creditor of the bank, as also the identity of the company, the money of which in part made this creditor whole. The Case of American Surety Co. vs. Bank 292 Fed. 609, largely relied on by appellant, furnishes no comfort to the contention made. The rule deducible from the cases is, that till the creditor is paid in full, no right of subrogation exists in favor of sureties who pay a part of the debt. In short, the creditor may insist on getting his full pound of flesh before others are allowed to sit at the banquet board.

If the bond of appellant National Surety Co. had been made to the county of Salt Lake, as obligee, or if Sec. 4500 supra, of the statutes of Utah, had required it so to be made, or perhaps even if the above section had made it absolutely obligatory upon Groesbeck to put the money of the county in some bank, there might be some force in the contention here urged. But the policy of the law of Utah seems, on casual view to render the county treasurer absolutely liable to the county for the repayment to the county of all money belonging thereto, which may come to his hands as such treasurer. He is merely permitted to deposit such money in a bank, but without by so doing, being able to shift the primary obligation for repayment from himself directly to the bank. We cannot

see that the fact, that in some aspects the money so deposited is, by the bank, held as a trust fund for the county, has the effect to make the county upon all views the creditor of the bank. The treasurer is yet the debtor of the county, and the bank is the debtor of the treasurer.

We are not convinced that there is any force in the contention that the treasurer was negligent in taking the collateral security mentioned in the record. From an examimnation of the record it does not seem to be proven whether this collateral was or was not, when taken, worth less than par. If it was worth par, and the evidence in the record is too indefinite to determine whether it was or not, then the sum of the so-called depository bonds and this collateral security
115 so nearly equalled the amount which the treasurer ought to have had on deposit, as to preclude the notion of negligence in failing to take sufficient security. If the sum so on deposit was more by $50,000 than the books of the treasurer showed, and this seems to be conceded, this difference was clearly due to the fraud of the bank which was the principal of the appellant, National Surety Co., on the depository bond.

Concretely, this contention of negligence is bottomed upon the views, (a) that the amount on deposit when the bank failed exceeded the sum total of the security held by Groesbeck from the bank, and thus was not in compliance with the statute quoted, and (b) that a part of this security, namely, the bonds of the Crystal Lake Farms Co., were not worth par, and again Groesbeck violated the statute. But while the evidence is not clear touching whether or not these bonds were worth par, yet it makes no difference in the case. This for the reason that the cashier of the bank assured Groesbeck that these bonds were worth par, and on this assurance he took them, and so the alleged negligence of Groesbeck was induced by the misrepresentations of appellant's principal. Again, whatever difference exists between the sum of the deposit and the sum total of the security held by Groesbeck, arises from the fraudulent conversion by the bank of $50,000, which had the effect to make the deposit $50,000 more than Groesbeck's books showed it to be. This difference was due to the bank's fraudulent failure to pay the above sum on orders from Groesbeck, which sum it ought to have paid and which Groesbeck believed it had paid. Obviously, the bank cannot complain of its own fraud, nor can its surety, for ordinarily 'a surety cannot be placed in a more favorable position than the principal.' (37 Cyc 429).

Lastly, it is contended that appellee, American Surety Co., ought not to have been allowed interest in the sum of $23,362.12, which accrued pending its resistance by litigation of its liability to pay at all. Abstractedly, the contention is interesting and seems to smack of justice, at least of that variety called in literature poetical justice. But concretely, this casual view is found not to be well taken in point of natural justice and equity and in view of the situation existing. For, while the appellee was resisting its liability to pay the amount of its fidelity bond, the matter of the winding up of the wrecked bank's affairs was also pending. Only shortly has enough been gotten from this wreck to pay out of dividends the balance due the county. Save the sum of about $9,000, around which, in part, the instant controversy rages, no fund has yet appeared out of which either party disputing here could have gotten one cent. So, plainly, the situation falls into the category denominated in homely vernacular, 'six of one and half a dozen of the other.' In other words, if interest had not accrued while the appellee was resisting by litigation its liability to pay its bond, the identical interest here involved would have accrued from the time of any voluntary payment to the date of the decree below. So, the fact of recalcitrancy, necessitating litigation, has in no wise affected the matter of interest, or the amount thereof. Interest would have been due the appellees in either event. Therefore, in the final analysis, this contention is but a corollary of the question already discussed and ruled against the appellants.

We are constrained to conclude that the decrees of the trial court were right as to both appellants, and that such decrees ought to be affirmed, and so we order.

Case No. 6819 affirmed.

Case No. 6820 affirmed.

Filed March 27, 1925.

A true copy.

Attest:

(Seal) E. E. KOCH,
Clerk U. S. Circuit Court of
Appeals, Eighth Circuit."

Mr. Jensen: Can it be stipulated between us that the National Surety Company which is plaintiff in the pres-
116 ent case is the same National Surety Company which was a party to the previous litigation to which I am referring; that Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City, is the same Edward E. Jenkins, —and the same National City Bank,—in the prior litigation as is involved in the present litigation; and that the American Surety Company and E. J. Groesbeck, who are involved in the present litigation, are the same parties who were involved in the prior litigation.

Mr. Moreton: We admit that, without admitting its materiality.

Mr. Jensen: We also desire to offer that part of Exhibit 3 commencing at page 83 and continuing over to the top of page 89.

(The part of the former record designated and offered is in words and figures as follows:)

"Mr. Moreton: Perhaps in logical order, I should have shown our application for the bond and the bond first, I will do so at this time. We offer Exhibit 13, the same being a copy of the original application of the National City Bank to the National Surety Company for this bond in the sum of $125,000.00.

Mr. Jensen: We make no objection to the application on the ground that it is a carbon copy, but we do object to it on the ground it is immaterial, irrelevant and incompetent, but our objection does not go to the effect that the application is a copy.

The Court: Objection may be overruled.

Mr. Jensen: Exception.

(Exhibit 13 is in words and figures as follows:)

'Notice; Agents' acts not binding on Company unless within Agents' written limits of authority.

'Safety First'

National Surety Company.
Capital and Surplus over $8,000,000.00.

Under Chapter 340 of the Laws of 1912 of the State of New York, any person obtaining property or credit by use of a

false statement is guilty of a misdemeanor punishable by fine or imprisonment or both.

Application By A Bank or Trust Company For Depository Bond National Surety Company:

Application is hereby made by the undersigned for a bond the amount and tenor of which are herein set forth.

1. Name and location of Bank or Trust Company. (Give correct corporate title) National City Bank of Salt Lake City, Utah.

2. Name of Obligee to whom bond is to run Edw. J. Groesbeck, County Treas.

3. Amount of bond $125,000.00.

4. Maximum amount of deposit bond is required to secure $125,000.00.

5. (a) Specify rate of interest to be paid 2½. (b) Moneys covered by this bond: County.

6. Date from which bond is required: Jan. 1, 1921.

7. Date upon which bond is to terminate Dec. 31, 1922.

8. Do you agree to pay $625.00 premium annually: Yes.

9. When was Bank or Trust Company incorporated and under the laws of what State was the incorporation had? Utah—1912.

10. Date of beginning business Feb. 1913. If reorganized, state when .....

117 11. Authorized Capital $250,000.00.

12. Amount of Stockholders' liability, if a State Bank $.....

13. When was last dividend declared, paid and amount:

14. When was the last examination made by National or State Bank Examiner? Nov. 29, 192...

15. Do you belong to the Clearing House Association? Yes.

15a. If not, why do you not belong to the Association?

16. Give names and titles of the officers who give continuous personal attention to the affairs of the Bank or Trust Company.

Name	Titles
Frank Pingree	Cashier
W. G. Goodart	Asst. Cash.
Geo. N. Lambourne	President
J. P. Gardner	Vice-Pres.
Henry J. Wallace	" "

17. By whom are the loans of the Bank or Trust Company directly authorized?

18. The following is a true financial statement of said Bank or Trust Company, showing its resources and liabilities at the close of business on the 22nd day of Dec. 1920

Resources

Loans and Discounts	2129631.70	
Amount of above loans to directors		
What amount secured by collateral $60550.00		
Amount of above loans to officers, not directors, approved by directors		
What amount secured by collateral		
Overdrafts, secured, $.....;		
unsecured, ...;		3262.31
U. S. Bonds to secure Circulation...	250000.00	
U. S. Government, State & Municipal bonds		1327227.12
Other stocks, bonds, mortgages		
Banking House, $.....:		
Furniture & Fixtures		100000.00
Other Real Estate owned		
Due from approved Reserve Agents	476236.47	
Due from other Banks and Bankers	521313.10	
Checks and other Cash Items	20992.73	2118542.30
Fractional Currency, Legal Tender Notes, Specie, Etc.		
Total		
Other Resources		12500.00
Total Resources		5941163.43

Liabilities.

Capital Stock paid in	250000.
Paid in Surplus, Earned Surplus	55000.
Undivided Profits	9211.95
National Bank Notes Outstanding	246100.00
Due to Banks	324693.76

Individual Deposits subject to check		
Time Certificates of Deposit		
Savings Deposits Postal	65558.87	
Other Deposits	4112756.34	5063320.92
	Total	
Dividends unpaid		777842.51
Notes and Bills rediscounted		100000.00
Bills Payable		
Total Liabilities		5941163.43

118 19. State rate of interest paid on various classes of deposits Ind. Dep. 2½ per cent—Time certif. of dep. 4 per cent—sav. Dep. 4 per cent—Other deposits 4 per cent.

20. Specify Town, City, County and other public or special deposits:

Depositor:	Amount Deposited:	Rate Int. Per Cent:	Surety Bond:	Amt. of Bond.	Date of Expiration

21. Do officers and employees give Corporate Surety Bonds? Blanket Bond. Give name of Surety U. S. F. & G. Co. Expiration Date .....

22. Does Bank carry Burglar Insurance? Yes. Amount: 150,000 Name of Company: Nat'l Surety: Expiration 1922-1923.

23. How much past due paper are you carrying? None.

24. If a National Bank state whether you are on the Comptroller of the Currency's special list: Yes.

This Agreement, made between National City Bank (hereinafter called the Depository,) and the National Surety Company (Hereinafter called the Company).

Witnesseth:

Whereas, the company has executed, or is about to execute for the Depository, the bond described in the foregoing application, which application is hereby referred to and made a part of this Agreement;

Now, Therefore, in consideration of the execution of said bond and the sum of One Dollar paid to the Depository by the Company, the Depository covenants and agrees with the Company as follows:

1. That all declarations and answers made in the foregoing application are true, and that the same are made for

the purpose of inducing the Company to execute the Bond applied for without demanding collateral security from the Depository.

2. That the Depository will pay to the Company, or its duly authorized Agent, the premiums agreed in said application to be paid.

3. That the Depository will, at all times, indemnify and keep indemnified the Company and save it harmless from and against all claims, demands, liabilities, costs, charges, and expense of every kind and nature which it shall at any time sustain or incur and as well from or against all orders, judgments, and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the Company its successors and assigns, all sums and amounts of money to meet every claim, demand, liability, cost charge, expense, suit, judgment or adjudication against it by reason of the execution of the Bond applied for and before the Company shall be required to pay thereunder.

4. That the Depository will immediately notify the Company at its principal offices in the City of New York, of the making of any demand or the giving of any notice or the commencement of any suit or proceeding, or the fixing of any liability which the Company may be called upon to discharge by reason of the execution of said Bond.

5. That the Depository will, on request of the Company, procure the Company's discharge from liability under said bond, and the Company shall, at its option, have the right to the use of the Depository's name, and to all the rights and privileges of the Depository, and at any time shall have the right to be discharged from liability for the further default of the Depository and to require the Depository to account and give new surety or sureties.

6. That vouchers or other evidence of payment by the Company in discharge of any liability under said Bond shall be prima facie evidence against the Depository of the fact and amount of the Depository's liability to the Company.

7. That the Company shall have the right to look to and rely upon the property of the Depository, and its in-
119 come and earnings, and to follow and recover out of the Depository's property now belonging to it, or which may hereafter belong to it, and the income and earnings thereof, for anything due or to become due the Company under this Agreement, the execution of said Bond by the

Company being for the Depository's special benefit and protection of the Depository's property, its income and earnings.

8. That the acceptance of this agreement, and of the depository's agreement to pay premiums for the execution of said Bond, or the acceptance at any time by the Company of other securities, shall not in any way abridge or limit the right of the Company to be subrogated to any right or remedy or limit any right or remedy which the Company might otherwise have, acquire, exercise or enforce, and the Company shall have every right and remedy which the individual surety acting without compensation would have.

9. It is understood and agreed that the Company reserves the right to decline to issue the bond for which application is hereby made, and that no claim may be made against the Company in consequence of its failure to execute such bond; nor shall any claim be made in case the bond, executed, be not accepted by or on behalf of the obligee.

In Witness Whereof, the Depository, by authority of its Board of Directors, or Trustee, has caused this agreement to be duly signed by its President and Cashier or Secretary, and its corporate seal to be thereto affixed this ..... day of ....., 19.....

In Presence of

NATIONAL CITY BANK OF SALT LAKE CITY.
Give Name of Bank.
By J. P. Gardner, President.

Attest:
Frank Pingree, Cashier.

(Affix Corporate Seal)."

Mr. Jensen: Can we stipulate, Mr. Moreton, that the Indemnity Agreement of the National City Bank to the National Surety Company there set out is the same Indemnity Agreement which you are now suing upon and that the bond which follows it on page 89 given in connection with that Indemnity Agreement is the bond under which you made the payment which you are now claiming entitles you to share as a creditor, because of the Indemnity Agreement?

Mr. Moreton: That is true.

Mr. Jensen: We offer those parts of Exhibit 3 to which I have referred.

Mr. Moreton: Plaintiff objects to them on the ground that they are immaterial, irrelevant and do not form or constitute in any manner a defense to the action herein sued upon, but I do not object on the ground that it is a copy.

The Court: Same ruling as heretofore made.

Mr. Moreton: Save an exception, and may it be considered that those have been offered separately and that our objection and exception goes to each offer separately?

The Court: That may be so understood.

120 Mr. Jensen: We make the offer of Exhibit 4.

Mr. Moreton: Same objection.

The Court: Same ruling. You may have an exception.

Cross-Examination of Mr. Jenkins

By Mr. Moreton:

Sixty per cent has been paid in dividends on the deposit of the funds of Salt Lake County in the National City Bank. The first dividend of twenty per cent was paid on September 7, 1922 amounting to $113,618.84, the second dividend of ten per cent was paid February 27, 1923, the third dividend of ten per cent was paid on October 5, 1923, the fourth dividend of ten per cent in May. 1924, and the fifth dividend of ten per cent, making a total of sixty per cent in all, was paid in April, 1925. These dividends amounted in all to $340,856.52. In addition to these dividends paid on account of this indebtedness to Salt Lake County, the Fidelity & Deposit Company was paid dividends on the same dates and in the same percentage, aggregating sixty per cent of $75,000.00, or $45,000.00. No other company has been paid anything on account of Salt Lake County. It is a fact that there has been paid on account of the indebtedness evidenced by the certificate for the full amount of the deposit, the sum of $125,000.00 by the National Surety Company and the sum of $25,000.00 by the Massachusetts Bonding & Insurance Company. This certificate that is outstanding on account of this deposit of the public funds of Salt Lake County, amounting at the time of the failure of the bank, to some $643,000, was issued by me as Receiver to E. J. Groesbeck, County Treasurer of Salt Lake County. There are certain endorsements on the certificate in red ink, but without the certificate I cannot tell you what these endorsements were that were placed there under the advice of my counsel.

Redirect Examination

By Mr. Jensen:

Of the dividend of October 5, 1923, of ten per cent, amounting to some $56,000, $47,666.01 went to Salt Lake
121 County to pay it off, and the balance of that dividend in the sum of $9,143.41 was deposited in Walker Brothers Bank under stipulation of all the parties, to await the outcome of the appeal in the prior case. The next dividend of ten per cent in May, 1924, was likewise deposited in Walker Brothers Bank under that stipulation, as was also the ten per cent dividend in April, 1925. So that there was deposited in that bank to await the outcome of the litigation between these parties in the prior suit, two dividends of some $56,000 each and the balance of the previous dividend of $9,143.41, making a total of $122,762.40. Outside of that money, no other money has been paid to either Mr. Groesbeck or the American Surety Company as a result of the judgment of this court.

Recross Examination

By Mr. Moreton:

About the time that I was ready to pay this third dividend on October 5, 1923, in the sum of $56,809.42, there was a claim made by the American Surety Company that it was entitled to be paid the balance of dividends on this deposit thereafter to be declared and paid by me after the County had first been paid the sum of $47,666.01 to make it whole. I am hazy about whether that claim was made directly to me or not, but it was a contention made by them that they were entitled to this money. In my answer in this former case, I set forth the fact that I didn't know to whom this money should be paid, and asked the court to determine to whom these dividends should be paid on this deposit.

W. E. McKell, a witness for the defendants, was sworn and testified on direct examination as follows:

My name is W. E. McKell and I am manager of the branch office of the American Surety Company at Salt Lake City, Utah. After the Supreme Court of the United States had denied the Petition for Writ of Certiorari in the prior suit, the amount of money which had been deposited in Walkers Bank together with the interest, was computed and I wired my company to draw upon Walkers Bank for a specified sum.

122 The total amount of the dividends deposited with the bank was $122,762.75 and interest $3017.47; total amount which I asked the company to draw $125,780.72. Neither I nor the American Surety Company have received any other moneys from the Receiver of the National City Bank than those moneys. That money is just in the process of being withdrawn from Walker Brothers Bank. The first draft came in yesterday, it was a draft to the reinsuring company that was presented there yesterday. The first certificate of $65,952.83 was put in the bank on 3, 6, 9, 12 months; as I recall it was November 8th.

I have computed the amount of principal and interest due under the decree of this court to the American Surety Company up until today. The interest at eight per cent on $200,000.00 from February 29, 1924, is $28,098.63. That plus the original jdgment of $223,362.15 is a total of $251,460.78. The company has received the dividends and the interest which I have just referred to of $125,780.72, leaving a balance due on the judgment of $125,680.06.

Exhibit 7 is a copy of the application which I received from Mr. Groesbeck for the bond under which the American Surety Company made payment of $223,000 odd dollars. The application is dated November 17, 1920, the term began January 2, 1921 and expired January 2, 1923. As a result of that bond we made that payment.

Mr. Jensen: I offer Exhibit 7.

Mr. Moreton: We object to it as incompetent, immaterial and irrelevant and not within the issues, not being pleaded and it forms no proper defense or any defense. We make no objection because it is merely a copy.

The Court: The objection will be overruled.

Mr. Moreton: Save an exception.

(Exhibit 7, offered and received in evidence, is in words and figures as follows:)

"This Form to be Used For Officers Whose Chief Duty is Handling Money.

123 American Surety Company of New York
Principal Offices 100 Broadway
Capital $5,000,000.

Bond No. 433233A
Branch Office at Salt Lake, Ut
Sub. Agency at S. L. C. No...
Agency Co.
Amount of Bond $200,000
Premium for term $1282.50
annum $675.00
Premium for term $1282.50
Period 1-3, 1920, to 1-3, 1921.

Company's Home Office Building.

Application for Bond

Public Officers and their employees (Including Federal Officers.)

Application of Edward J. Groesbeck. (Give name in full.) Office, County Treasurer. Date, Nov. 17, 1920. Employer Salt Lake County. (Give date of appointment or election) (United States, State, County, Village, etc.)

Term begins Jan. 2, 1921. Amount of Bond.....

Effective date, Jan. 2, 1921.

Term expires Jan. 2, 1923. Bond in favor of Salt Lake County.

1. Where and when were you born? Place, Salt Lake City, Date, Dec. 29, 1880.

2. If foreign born, how long resident of United States. Since (Date) ....., 1.....

3. If not now a citizen of the United States, then of what country?

4. If a naturalized citizen of the United States, state date of naturalization, where, and in what court. Date....., in (Name of Court)....., Court at (place and State).....

5. Present locality of residence (Give residence address Street and number where possible) 1013 Blain Ave. Office Address 105 So. State. How long a resident of said city or town? Since (Date) about Dec. 29, 1880.

6. Single? Are You Married? Yes. A Widower..... Number of children none How many self supporting and live apart from you?..... How many with you .....

If others depend upon you for support, give names.

6a. If married give name and address of your wife.

7. How long have you occupied the office for which this bond is required?

8. What yearly income will you receive from your office? (State whether salary or fees.) $3300.00—salary.

9. If any other allowances will be made to you, or salary is subject to any deduction, state particulars.

10. State whether the duties of your office include the collection of taxes (delinquent or otherwise) or the custody of public moneys of the county, district or any political body? Yes.

10a. If the bond is desired for a tax collector, give the exact or the approximate amount of the tax roll.

11. Have you any deputies? Yes. If so, how many? 2. Are they bonded by corporate or personal sureties, and in what amounts?

12. At what times are your official accounts subject to examination and by whom is the examination made. Yearly. State Auditor.

13. When and by whom were your accounts last examined, and were they found correct?

14. What is your present business? Deputy City Recorder.

15. Will you continue therein or receive an income from that or any other source besides your official compensation? No. Estimated total (including official) annual income, $3300.00.

124 16. (a) Do you own any real estate in your own name? No. If so, state following particulars:

Location	Description	Value	Encumbrances
.....	.....	.....	.....

(b) Please give description and approximate value of your personal property. None except household effects.

17. Have you ever been bankrupt or insolvent? No. Did you ever compromise your liabilities with creditors? No. Note. If discharged from, or still under liabilities incurred through being bankrupt or insolvent, or if either or both of the questions are answered 'Yes', state particulars in separate confidential letter to company.

18. Do you occasionally engage in purely speculative or hazardous transactions, such as stocks, grain, oil or real estate? No. Have you ever been in arrears or default in your present or any previous employemnt? No. Note: If either question is affirmatively answered, give particulars in separate letter to the company.

19. Give particulars and amount of

(a) Debts? none. (b) Judgments.....

(c) Liabilities from acting as endorser or security?

(d) Any other obligations not included in above?

20. Have you hitherto given security? If so, please give names and addresses of your bondsmen, and state why discontinued.

21. Do you now furnish security in addition to that herein applied for? If so, what kind, and to what extent?

22. Have you ever aplied to any other source for a bond? If so, state when and to whom, and whether successful. No.

To Avoid Delay in Issuance of Bond Answer Questions 23 and 25 Strictly In Accordance with the Requirements.

23. Please fill in the following blanks, giving dates of your employment and names of your employers during the past ten years, and showing places of residence even if not employed continuously during that period.

From What Date (Give Month and year)	To What Date (Give Month and year)	Employed as	At address	In Service of (Name of Employer or Corporation)
1.1.1909	12-31-1910	Clerk	Dooly Bldg.	Internat'l Smelt & Ref.
1.1.1911	2.1.1912	Deputy	C. & C. Bldg.	Salt Lake County
2.1.1912	10.31.1913	Agent	Salt Lake County	Salt Lake Speedway Co.

11.1.1913	12-31-1914	Deputy	Salt Lake County	Salt Lake County
1.1.1915	7.1.1917	"	"	"
7.1.1917	2.1.1918	"	"	"
2-1-1918	to date	"	"	Salt Lake City Corp.

Under

(Name of Manager, Superintendent or Head)
(of Department for Reference, with)
(present Post Office Address.)

Frank Kennedy, Butte, Mont.

Roscoe W. Vigus, Salt Lake

Dr. Fred Stauffer
Salt Lake City

Fred C. Bassett
Salt Lake City

Raymond C. Naylor—Calistoga

W. W. Barton—S. L. City.

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125 24. If your life is insured, state for what amount, for whose benefit, kind of policy, and in what Company.
Yes. $5000. Wife, 20 year pay Mutual Life.

25. Please give particulars respecting parents and nearest relatives, as follows:

Name of Father Wm. Groesbeck. Business. Dead. Address.....
" " Mother Eleanor C. Groesbeck, Address 158—1st Ave..

a. Names and addresses of brothers and sisters.

W. Groesbeck—Los Angeles, Calif.
Mrs. H. R. Eldredge, Cardston Alberta, Canada
Mrs. T. A. Clawson—158—1st Ave. Salt Lake City.

b. Nearest relatives and addresses, for reference if desired.

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26. Please give below the names and addresses of persons, not less than six (preferably eight, because all may not reply to inquiries), of intelligence and good standing,

householders where possible, for Referees, who have had a personal acquaintance with you, and who are not related to you, In no case, however, should a person be named who is a partner, or one of the firm, or an officer of the employer in whose favor the bond herein applied for is to be made.

Name	Occupation	Post Office Address If in a City, give definite location.
1. W. Mont Ferry		Salt Lake City
2. Roscoe W. Vigus		"
3. Fred C. Bassett		"
4. Dr. Fred Stauffer		"
5. R. W. Young		"
6. W. W. Barton		"
7. W. A. Leatham		"
8.		

In Consideration of the American Surety Company of New York acting as surety on the bond herein applied for, I hereby agree to pay to said Company, at its office in the City of New York, or to an authorized local agent, in advance, in each and every year, the premium charge of ..... dollars, unless said premium is reduced by the surety, until I serve upon said Company at said office competent written legal evidence of its discharge from its said suretyship and all liability by reason thereof.

It is agreed that the terms of agreement herein shall be binding upon the applicant in the event of his subsequently holding the said office, and his acceptance, express or implied, from the surety of its surety ship covering him therein, subject, however, to amendments of premium rate to conform to the surety's published schedule rate for such suretyship at the time of any such acceptance, which latter rate the applicant hereby agrees to pay.

That the acceptance by the Surety Company of this agreement or of additional security or of premiums or other compensation for its suretyship shall not in any way abridge, defer or limit its rights, privileges or immunites as surety which it might otherwise have or create against it any liability which would not otherwise exist.

The undersigned further binds himself, his heirs, executors, administrators and assigns to indemnify and keep indemnified the Surety from and against any liability, loss,

costs, charges, suits, damages, counsel fees and expenses of whatever nature, which the Surety shall or may for any cause, at any time, sustain or be put to in consequence of the Surety having executed said bond, or any renewal, continuation, extension or modification thereof.

I do also agree that said Surety Company may decline to become surety for me upon the bond hereinbefore applied for, or any other bond or obligation, and that it may cancel or withdraw from such bond, executed, or any other
126 bond or obligation it may execute for me, or any renewal or continuation thereof; and I do also expressly relieve said Surety Company and all others from disclosing or furnishing any information it may have obtained concerning me or my affairs, and do also relieve said Surety Company from any compliance with any provisions of any laws concerning the disclosure of any knowledge or information which may have been obtained concerning me or my affairs, and do release and discharge said Surety Company, and every person, association, firm or corporation furnishing it with any information concerning me or my affairs from any and all liability or responsibility under or by reason of any of the provisions of any of said laws, and from any and all claims, demands, causes of action and damages that may have, or purport to have, arisen by reason of any such laws, or any amendments thereof, or supplements thereto.

Signed and sealed.....19.....

Signed, sealed and delivered in the presence of:

.....

..... (Seal)

Applicant sign here EDWARD J. GROESBECK (Seal)"

Direct Examination of Mr. McKell Continued

By Mr. Jensen:

Q. Now, Mr. McKell, will you state to the court whether or not Mr. Groesbeck has paid anything to you on account of the moneys you paid to Salt Lake County as the surety on his official bond?—paid to the American Surety Company any moneys on account of the payment of $223,000 odd dollars which you made to Salt Lake County as a result of the failure of the bank as his official surety?

Mr. Moreton: Objected to as incompetent, immaterial, not within the issues.

A. Mr. Groesbeck has made no payment to the American Surety Company.

The Court: The objection may be overruled.

Mr. Moreton: Save an exception.

Q. So the only moneys you have received are the moneys which you have already testified to as having been paid by Walker Brothers Bank as a result of the two 10 per cent dividends and the balance of the previous dividend amounting to nine thousand odd dollars?

A. And the interest referred to, yes, sir.

Q. And if the Receiver in this case only pays an additional 15 per cent that will not be ample, will it Mr. McKell, to pay the balance of $125,666.00 still due?

127 A. No.

Mr. Moreton: May I have my objection before the answer that it is immaterial, not within the issues?

The Court: The objection may be overruled.

Mr. Moreton: Note an exception.

Cross-Examination of Mr. McKell

By Mr. Moreton:

Q. In figuring the amount of interest on $200,000.00 at eight per cent from February 29, 1924, I figured up to this date. There was $122,762.25 deposited in Walker Brothers Bank by the Receiver, which consisted of $9,143.41, the balance of the third dividend of ten percent, and the fourth dividend of $56,809.42, a total of $65,952.83 deposited on November 8th with Walker Brothers Bank by the Receiver, and approximately six months later the fifth dividend in the sum of $56,809.42 was deposited with that bank. The full sum of $122,762.25, together with $3017.47 interest, is made available for the company at the bank and the first draft drawn by the company in the sum of $17,952.71 was presented yesterday, being drawn in favor of the Preferred Accident Insurance Company.

The money was deposited in that bank in two deposits, one in November, 1924, and the other six months later, in May, 1925. The years certificate on the one matured on the 8th day of November and the six months period on the other

one at the same time. The interest was computed upon those certificates up to that time amounting to $3017.47. The figure of $3017.47 is the interest on the two certificates due November 8, 1925.

Mr. Jensen: We simply stipulated in the prior case that Walkers pay the money to the American Surety Company in the event the decree was affirmed or according to whatever decree was rendered by the upper court, and then when the matter went to the Supreme Court of the United States on certiorari, when the writ was denied within the time required, before they would pay that Mr. Moreton authorized payment; they were unwilling to pay without a statement from him.

Mr. Moreton: I have a copy of that statement, I will be glad to present. The only reason I want to offer this
128 paper I delivered to Walker Brothers Bank was for the reason it has been stated it was a consent; it may be argued that that too is res adjudicata.

The Court: Bring it along with you after adjournment.

The money was deposited in the form of a certificate deposit under an escrow agreement. The bank wanted some evidence before it released it. As soon as the amount was known and it was subject to the order of the American Surety Company, I wired the amount that was available. I felt that we were entitled to the money on November 8th. I understood what the decision of the Circuit Court was. As far as I was personally concerned, the bank had control of the money under the escrow agreement. After November 8th, the question of interest did not enter into the matter of the money being withdrawn by our company. Exhibit 8 is the original official bond executed by the American Surety Company for E. J. Groesbeck in the sum of $200,000.00, which he executed at the time he qualified for office.

(Exhibit 8 was offered and received in evidence and is in words and figures as follows:)

"American Surety Company
of New York
Capital $5,000,000.

Official Bond—Utah

Company's Home Office Building
100 Broadway, New York.

Know All Men By These Presents, That we Edward J. Groesbeck of Salt Lake City, Utah, as principal, and the

American Surety Company of New York, a corporation of the State of New York, duly authorized to do a surety business in the State of Utah, as surety, are held and firmly bound unto Salt Lake County, State of Utah.... in the penal sum of Two Hundred Thousand ($200,000.) Dollars, lawful money of the United States, for the use of whomsoever it may concern for which sum well and truly to be paid, the said principal hereby binds himself, his heirs, executors, administrators and assigns, and the said surety binds itself, and successors, jointly and severally, firmly by these presents.

In Witness Whereof, the said principal hereunto sets his hand and the said surety has caused these presents to be signed this 15th day of December 1920.

The Condition Of This Obligation Is Such, that whereas, the above bounden principal has been duly elected to the office of County Treasurer in and for Salt Lake County for a term beginning January 3rd, 1921.

Now, therefore, if the said Edward J. Groesbeck shall well, truly and faithfully perform all official duties now required of him by law and also such additional duties as may be imposed on him by any law of the State, subsequently enacted,
and if he shall account for and pay over and deliver to
129 the person or officer entitled to receive the same, all
moneys or other property that may come into his hands as such County Treasurer, then this obligation to be null and void and of no effect; otherwise to be and remain in full force and virtue.

(Signed) EDWARD J. GROESBECK

AMERICAN SURETY COMPANY
OF NEW YORK,
By (Signed) J. C. Smith,
Resident Vice-President.

Witness:
K. D. Hurdy (Signed)

(Seal of
American Surety
Company of New
York.)

Attest:
(Signed) H. Bay
Resident Assistant Secretary.

Statutory Affidavit for Corporate Surety—Utah.

State of Utah,
County of Salt Lake—ss.

Personally appeared before me, a Notary Public in and for [the] Salt Lake County, State of Utah, J. C. Smith, who being first duly sworn on oath deposes and says that he is Resident Vice-President of the American Surety Company of New York, a corporation organized under the laws of the State of New York, and that he is duly authorized to execute and deliver the foregoing obligation; that the said American Surety Company of New York is authorized to execute the same and has complied with all the laws of the State of Utah in reference to becoming sole surety upon bonds, undertakings and obligations. Affiant further says that William E. McKell, whose address is Salt Lake City, Utah, has been appointed as Attorney upon whom process for the State of Utah may be served according to law.

(Signed) J. C. SMITH

Subscribed and sworn to before me this 15th day of December, 1920.

(Seal) L. E. BEUSCHELL,
Notary Public.

My Commission expires''

Cross-Examination of Mr. McKell continued

By Mr. Moreton:

I stated in my former action that I checked up the security that was held by Mr. Groesbeck from the National City Bank, for the safe-keeping of the public funds deposited in the bank. I checked this up in the December previous to the failure of the bank. In the previous case I stated I had made inquiry regarding the security and Mr. Pingree had advised me relative thereto. That is the policy of surety companies generally and my company followed that practice in this instance, when I undertook to check up the depository protection taken and held by Mr. Groesbeck from the National City Bank in December prior to the failure of the bank. It was to our interests to do so. At the time
130 of the failure of the National City Bank, Mr. Groesbeck had as security for the safe-keeping of public funds deposited in the bank, a depository surety bond of the

National Surety Company in the sum of $125,000.00, a depository bond of the Massachusetts Bonding & Insurance Company in the sum of $25,000.00, and the bond of the Fidelity & Deposit Company in the sum of $75,000.00, aggregating in all $225,000.00 in corporate surety bonds for the safe-keeping of the public funds. In addition to these corporate surety bonds just mentioned, the National City Bank had pledged and delivered to Mr. Groesbeck, for the safe-keeping of those public funds so deposited, $360,000.00 in par value of the Crystal Lake Farm Company bonds. These bonds are held under an option agreement. The Halloran-Judge Trust Company has the physical possession of them. My Company does not nor does Mr. Groesbeck. At the trial of the other action I stated that in checking up these securities I was interested in seeing there was sufficient depository protection.

Mr. Jensen: Out of Exhibit 3 I offer in evidence the eighth Assignment of Error of the appellant National Surety Company on its appeal to the Circuit Court of Appeals from the decree of this Court, which appears at page 126 of Exhibit 3 and extends down to approximately the middle of page 128.

Mr. Morteon: We make no objection on the score it is a copy, but object to it as immaterial and irrevelant and not within the issues of this case.

The Court: Let the objection be overruled.

Mr. Moreton: Save an exception.

(Said eighth Assignment of Error from Exhibit 3 offered and received in evidence, is as follows:)

"The trial Court erred in failing to order, adjudge and decree that the claim of the National Surety Company against the said defendant Receiver in the sum of $125,000.00 and interest from June 5, 1922 at the rate of eight per cent per annum should be allowed and approved and that the defendant Receiver be ordered to pay to said National Surety Company the sum of $9,143.41 of the dividend now declared together with such further dividends as may be declared by him upon said deposit and that said National Surety Company is subrogated to and entitled to succeed to the rights of said Edward J. Groesbeck as Treasurer of Salt Lake
County and of Salt Lake County to all dividends that
131 may become payable on the claim of said Salt Lake
County and said Edward J. Groesbeck its Treasurer,

against said Receiver in the sum of $568,094.29, and that said National Surety Company is subrogated to and entitled to succeed to the rights of said Salt Lake County and said Groesbeck, its Treasurer, in the bonds of the Crystal Lake Farm Lands Company of the par value of $360,000.00 held by said Groesbeck as collateral security for the deposit of said moneys in said National City Bank until said National Surety Company shall have received on account of said dividends and/or the proceeds of said bonds the total sum of $125,000.00 together with interest thereon at the rate of eight per cent per annum from June 5, 1922, and that said National Surety Company is entitled to sell or otherwise dispose of said bonds and to apply the proceeds thereof toward the repayment of its claim as aforesaid, and that the said American Surety Company is not entitled to receive or participate in any of said dividends or said Crystal Lake Farm Lands Company's bonds of the par value of $360,000.00, or of the proceeds thereof, until the said claim of the National Surety Company is paid in full, for the reason that it appears by the evidence in said action and particularly by the depository bond furnished by said defendant National Surety Company to the plaintiffs E. J. Groesbeck as County Treasurer and to Salt Lake County, in behalf of said National City Bank and from the application for said bond executed by said bank, and by the undisputed testimony, that said National Surety Company has paid to said E. J. Groesbeck as County Treasurer, and to Salt Lake County the full penalty of its said bond in the sum of $125,000.00 and that said National Surety Company by reason thereof and by reason of its payment of said sum as aforesaid and by operation of law, and in justice, equity and good conscience, became and is entitled to be subrogated to the amount of such payment to all the rights and claims of Salt Lake County and E. J. Groesbeck, its Treasurer, against said National City Bank and said Edward E. Jenkins as its Receiver and that such claim is superior to any claim on the part of said American Surety Company, a corporation, and for the further reason that the undisputed evidence shows said National Surety Company has a valid claim for reimbursement from the Receiver of said Bank as provided for in said application made by said Bank for said Bond, in which application said National City Bank promised to indemnify and hold said National Surety Company harmless from any loss on account of its execution of said bond for said Bank, and that if said American Surety Company has any such right or claim upon the assets or funds in the hands of said Receiver, it is subsequent and inferior to

the rights of this defendant National Surety Company and must be postponed until such time as said National Surety Company has been made whole by reason of its said payment of $125,000.00 together with interest at the rate of eight per cent per annum from the date of its payment of the same on June 5, 1922. That the undisputed evidence shows that the right of subrogation of said American Surety Company, if any, is against the principal upon the bond executed by it, to-wit: E. J. Groesbeck, and that it is not entitled to either subrogation or reimbursement as against the said National City Bank or its Receiver; and that the legal right of the National Surety Company to reimbursement from said Bank and the Receiver thereof by reason of said application executed by said Bank and to the equitable right of direct subrogation against the said Bank and its Receiver, as the principal upon said bonds, is superior to any alleged right of said American Surety Company against said bank or its Receiver and the funds in his hands as such Receiver. That the undisputed evidence shows that E. J. Groesbeck, the principal on said official bond, executed by said American Surety Company, failed to comply with the provisions of Section 4500, Compiled Laws of Utah, 1917 by not taking full and complete depository protecton to cover the funds of Salt Lake County in said National City Bank and that had he done so the American Surety Company would have suffered no loss, and therefore, it should not be allowed to take advantage of the wrong of its principal to the injury of this defendant."

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132 Mr. Jensen: I suppose we can stipulate that Exhibit 10 is a true copy of the briefs filed by the National Surety Company in the Circuit Court of appeals in the other case, and Exhibit 9 is a true copy of the reply briefs of the National Surety Company in the appeal to the Circuit Court of Appeals.

Mr. Moreton: That is the fact.

Mr. Jensen: I desire to offer the following portion of Exhibit 10; beginning at page 4, commencing with the words "That said depository bond so executed by defendant," and ending on page 5, "Total $225,000.00"

Mr. Moreton: We object to the offer on the ground that it is immaterial, irrelevant and not a matter of defense in this case, which is one at law based upon an Indemnity Agreement, and for the further reason it is not fair to pick out a portion of this argument and offer that portion only.

The Court: That is the reason I am going to let the whole book in. You can refer to any that you want to, but he is designating now that upon which he relies, so as not to encumber the record, unless you think it is necessary to print the whole thing.

Mr. Moreton: I may want to offer the whole, inasmuch as part is offered and received on the theory that there may be parts that I may want to pick out and make a part of the record.

The Court: I will receive the whole book. We will consider all of the document in. You are at liberty to refer to any other portion that you want to.

Mr. Moreton: May I have an exception?

The Court: Yes.

(The portion of Exhibit 10 designated and offered by counsel as above, is as follows:)

"That said depository bond so executed by the defendant and appellant National Surety Company in behalf of said National City Bank in the sum of $125,000.00 was executed by it on or about the 3rd day of January, 1921, pursuant to a written application made therefore by said National City Bank, paragraphs three and eight of which application are as follows:

'3. That the Depository will, at all times, indemnify and keep indemnified the Company and save it
133 harmless from and against all claims, demands, liabilities, costs, charges, and expenses of every kind and nature which it shall at any time sustain or incur, and as well from or against all orders, judgments and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money to meet every claim, demand, liability, cost, charge, expense, suit, judgment or adjudication against it by reason of the execution of the Bond applied for and before the Company shall be required to pay thereunder.' (Tr. 87)

'8. That the acceptance of this agreement and of the Depository's agreement to pay premiums for the execution of said Bond, or the acceptance at any time by the Company of other securities, shall not in any way abridge or limit the right of the Company to be subrogated to any right or rem-

edy or limit any right or remedy which the Company might otherwise have, acquire, exercise or enforce, and the Company shall have every right and remedy which the individual surety acting without compensation would have.' (Tr. 88).

That upon the failure of said National City Bank, the said surety company furnishing said depository bonds, paid to Salt Lake County and E. J. Groesbeck, its Treasurer, the full penalty of each of their respective bonds, as follows, to-wit:

National Surety Company	$125,000.00
Massachusetts Bonding & Ins. Company	25,000.00
Fidelity & Deposit Company	75,000.00
Total	$225,000.00

Mr. Jensen: I desire to particularly offer that part of Exhibit 10, commencing on page 11, with the words, "The said National Surety Company," and ending about the middle of that page, " said amount arising out of said bond to said defendant Receiver."

(Said portion of Exhibit 10, so designated and offered by counsel, is as follows:)

"The said National Surety Company, in its said Answer and Interpleader, further alleged that by reason of its said payment to Salt Lake County of the said sum of $125,000.00 and by operation of law, and in justice, equity and good conscience, it is entitled to subrogation in said amount as against the Receiver and its principal, the said National City Bank; and that the American Surety Company is entitled to subrogation only as against its principal, the said E. J. Groesbeck; and further alleges that the said National City Bank, in its written application to the said National Surety Company for said depository bond in the sum of $125,000.00, and as consideration for the issuance of said bond, promised and agreed to hold the said National Surety Company harmless and to indemnify and reimburse it for any loss which it might sustain by reason of its execution of said bond, and that following its payment to Salt Lake County of the penalty of said bond in the sum of $125,000.00, the National Surety Company duly presented its claim in said amount arising out of said bond to said defendant Receiver."

Mr. Jensen: On page 15, beginning with the first line "For the reason," and ending with the phrase, "and the funds in his hands as such Receiver"—that is the seventh line from the bottom—practically the entire page.

(The portion of Exhibit 10 so designated and offered by counsel, is as follows:)

134 "For the reason that it appears by the evidence in said action and particularly by the depository bond furnished by said defendant National Surety Company to the plaintiff E. J. Groesbeck as County Treasurer and to Salt Lake County, in behalf of said National City Bank and from the application for said bond executed by said Bank, and by the undisputed testimony, that said National Surety Company has paid to E. J. Groesbeck as County Treasurer and to Salt Lake County the full penalty of its said bond in the sum of $125,000.00; and that said National Surety Company, by reason thereof and by reason of its payment of said sum as aforesaid and by operation of law, and in justice, equity and good conscience, became and is entitled to be subrogated to the amount of such payment to all the rights and claims of Salt Lake County and E. J. Groesbeck, its Treasurer, against said National City Bank and said Edward E. Jenkins as its Receiver and that such claim is superior to any claim on the part of said American Surety Company, a corporation, and for the further reason that the undisputed evidence shows said National Surety Company has a valid claim for reimbursement from the Receiver of said Bank as provided for in said application made by said Bank for said bond, in which application said National City Bank promised to indemnify and hold said National Surety Company harmless from any loss on account of its execution of said bond for said Bank, and that if said American Surety Company has any such right or claim upon the assets or funds in the hands of said Receiver, it is subsequent and inferior to the rights of this defendant National Surety Company and must be postponed until such time as said National Surety Company has been made whole by reason of its payment of $125,000, together with interest at the rate of eight per cent per annum from the date of its payment of the same on June 5, 1922. That the undisputed evidence shows that the right of subrogation of said America Surety Company, if any, is against the principal upon the bond executed by it, to-wit, E. J. Groesbeck, and that it is not entitled to either subrogation or reimbursement as against the said National City Bank or its Receiver, and that

the legal right of the National Surety Company to reimbursement from said Bank and the Receiver thereof by reason of said application executed by said Bank and to the equitable right of direct subrogation against the said Bank and its Receiver, as the principal upon said bond is superior to any alleged right of said American Surety Company against said Bank or its Receiver, and the funds in his hands as such Receiver."

Mr. Jensen: Then, commencing on page 18, with the word "Argument," and continuing from there over to the middle of page 21, ending with the words, "In any event, it must be apparent that our legal right is superior to any purely equitable claim of subrogation asserted by the American Surety Company."

(The portion of Exhibit 10 so designated and offered by counsel, is as follows:)

"Argument.

The Legal Right of This Appellant Against Said Bank, Arising Out of Contract.

In response to the request of the defendant Receiver of said National City Bank, the trial court made its order herein requiring the appellant National Surety Company and American Indemnity Company to set forth their respective rights to the funds in the hands of the Receiver and those to hereafter accrue in his hands. Accordingly, each of the appellants filed their separate answers herein to said order of interpleader and in paragraph 12 of each of said respective answers (Tr. pp. 18, 27) it is alleged:

135 'That the said National City Bank in its written application to this defendant for said depository bond in the sum of $125,000.00, and as a consideration for the issuance of said bond, promised and agreed to hold the said National Surety Company harmless, and to indemnify and reimburse it for any loss which it might sustain by reason of its execution of said bond and following its payment to Salt Lake County of the penalty of said bond in the sum of $125,000.00, the National Surety Company duly presented its claim in said amount arising out of said bond to said defendant receiver.' (Tr. 18-19, 29).

In its answer, this appellant National Surety Company further alleged among other things, the facts with reference to its payment of the penalty of its said bond, the failure of

Treasurer Groesbeck to require said Bank to finish full and complete depository protection for the public funds, as required by law, the terms and conditions of the bond of the American Surety Company, and other facts relative to the right of this appellant to subrogation. The answer of the appellant concludes with a prayer that its claim against said defendant receiver arising out of the contract of said National City Bank to indemnify and hold it harmless and to reimburse it for any loss on account of its execution of said bond, be allowed and approved, and the defendant receiver ordered to pay this appellant dividends thereon. This appellant further prayed that it be given such other and further relief as to the court might seem just and equitable.

The claim of the National Surety Company to priority in the distribution of the dividends in the hands of and to be hereafter paid by the Receiver of said Bank, is therefore based upon two theories, first, its legal right of the reimbursement and second, its equitable right to subrogation. However, we wish to say at the outset of this argument, and most emphatically, that we rely foremost and primarily upon our legal right of reimbursement, based upon the rights acquired and reserved by this appellant and given to it by said Bank as the inducement and consideration for its execution of said bond.

Said agreement was offered by appellant and received in evidence and is in part as follows:

'Whereas, the company has executed, or is about to execute, for the Depository, the bond described in the foregoing application, which application is hereby referred to and made a part of this agreement:

'Now, Therefore, in consequence of the execution of said bond and the sum of One Dollar paid to the Depository by the Company, the Depository covenants and agrees with the Company, as follows:* * *

'3. That the Depository will, at all times, indemnify and keep indemnified the Company and save it harmless from and against all claims, demands, liabilities, costs, charges, and expense of every kind and nature which it shall at any time sustain or incur and as well from or against all orders, judgments, and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the Company, its successors and

assigns, all sums and amounts of money to meet every claim demand, liability, cost, charge, expense, suit, judgment, or adjudication against it by reason of the execution of the Bond applied for and before the Company shall be required to pay thereunder.

'4. That the Depository will immediately notify the company at its principal offices in the City of New York, of the making of any demand or the giving of any notice or the commencement of any suit or proceeding, or the fixing of any liability which the Company may be called upon to discharge, by reason of the execution of said bond. * * *

'7. That the Company shall have the right to look to and rely upon the property of the Depository and its income and earnings, and to follow and recover out of the Depository's property, now belonging to it, or which may hereafter belong to it, and the income and earnings thereof; for anything due or to become due the Company under this agreement, the execution of the said Bond by the Company being for the Depository's special benefit and protection of the Depostiory's property, its income and earnings.

136 '8. That the acceptance of this agreement, and of the Depository's agreement to pay premiums for the execution of said Bond, or the acceptance at any time by the Company of other securities, shall not in any way abridge or limit the right of the Company to be subrogated to any right or remedy or limit any right or remedy which the Company might otherwise have, acquire, exercise or enforce, and the Company shall have every right and remedy which the individual surety acting without compensation would have.' (Tr. p. 87.)

The claim of this appellant arising out of said contract with said bank should have been allowed and approved by the trial court, and the Receiver directed to pay to it dividends thereon (Assignment of Error No. 8, Tr. p. 126).

In the case of United States Fidelity and Guaranty Company vs. Carnegie Trust Company, 164 N. Y. Supp. 92, it was held that where a trust company gave its indemnity agreement, covenanting to make good to a surety company which executed a bond for it, any moneys which that surety should be compelled to pay under the bond, the surety company became creditor of the trust company to the extent of the required payment and that the surety company had a right to have its claim allowed, approved and paid by the Superin-

tendent of Banks in charge of said defunct Carnegie Trust Company.

Paragraphs 7 and 8 of the indemnity agreement of this appellant are identical with the indemnity agreement considered in the case last mentioned above and reserve the right to this appellant to look to and rely upon the property of the depository and its income and earnings and to follow and recover out of its property for anything due or to become due to the appellant under said agreement, and further provided that the acceptance of said agreement 'shall not in any way abridge or limit the right of the Company to be subrogated to any right or remedy or limit any right or remedy the Company might otherwise have.' (Tr. p. 88) Therefore, by the specific terms of said contract executed by said Bank, this appellant acquired the right to look to the property of the Bank and to follow and recover the same in the hands of said defendant receiver of said bank. The appellant National Surety Company has thus become a creditor of the National City Bank, and its right to payment of dividends thereon, cannot be impaired by any claim of the American Surety Company. To hold otherwise would impair the contractual rights of this appellant and render the indemnity agreement of this appellant nugatory.

We fail to see how there can be any question of our legal right to recover from said receiver, based upon said contract of indemnity. At the time of the failure of the bank, this claim was a valid and outstanding obligation against the bank upon which a claim may be properly asserted against the Receiver, just as on any other debt of the bank. Such a claim would be proveable in bankruptcy or against an estate, and why not against the Receiver of this Bank? However, it may be said that this appellant, independent of its indemnity agreement, has the right of subrogation. That may be true, but at the same time such right of subrogation cannot detract from our legal rights.

The trial Court apparently ignored our legal rights against said bank, arising out of said contract of indemnity and evidently based its decision solely upon what it thought the equities of the parties were. It therefore becomes necessary for us to discuss the equitable rights of the parties, but in so doing, we do not wish to be understood as agreeing that this case should be decided solely upon the equities of the parties, even though we are decidedly of the opinion that the

equities of this appellant are superior as we shall hereafter point out. In any event, it must be apparent that our legal right is superior to any purely equitable claim of subrogation asserted by the American Surety Company."

Mr. Jensen: On page 44, the third paragraph there, beginning with the words "The decree complained of" and ending with the words "of this appellant."

137 (The portion of Exhibit 10 so designated and offered by counsel, is as follows:)

"The decree complained of herein operates to defeat the legal rights of this appellant against its principal, the said Bank, as well as to work an injustice to the superior equities of this appellant. But assume that the equities of this appellant and the American Surety Company are but equal, it still follows that subrogation to the American Surety Company will not be permitted to work an injustice to the equities of this appellant."

Mr. Jensen: Page 51, the last paragraph on that page.

(The portion of Exhibit 10 so designated and offered by counsel is as follows:)

"It is therefore most respectfully submitted, that the decree of the trial court herein be reversed, and that a decree be entered herein that the claim of the National Surety Company against said Receiver in the sum of $120,000.00, and the claim of the American Indemnity Company against said Receiver in the sum of $5,000.00, be allowed and approved, that the Receiver of said National City Bank be directed to pay to each of said appellants dividends on their respective claims, that the American Surety Company is not entitled to receive any dividends now in the hands of said Receiver or to hereafter accrue in his hands, until these appellants have been first reimbursed in full, that these appellants be authorized to sell said Crystal Lake Farm Lands Company bonds and to apply the proceeds thereof toward the repayment of their respective claims aforesaid, and that the claim of the American Surety Company herein be postponed until the said appellants and each of them are first repaid in full from funds accumulating in the hands of said Receiver, and/or proceeds from the sale of said Crystal Lake Farm Lands

Company bonds, and that the Court make such other and further order herein as may be just and equitable.

ARTHUR E. MORETON,
Attorney for Appellants National Surety Company and American Indemnity Company."

Mr. Jensen: From Exhibit 9 I particularly invite attention to page 11, beginning with the large cap sentence, "Indemnity Agreement of the Bank to The National," and continuing over to subdivision 2 on page 12.

(The portion of Exhibit 9 so designted and offered by counsel, is as follows:)

"Indemnity Agreement of the Bank of the National.

1.

In its discussion of this subject the American says that the National has no legal right on account of its indemnity agreement from the bank to take any of the dividends 'payable on the Treasurer's claim.' It argues that the American and the Treasurer had no knowledge of any such agreement. In reply, we say that they knew that the National was a surety only for the bank and had a right, irrespective of any indemnity agreement, to look to its principal, the bank, for reimbursement. But can the American claim that the National had any knowledge of its indemnity agreement with the Treasurer and upon which it so strongly relies to defeat the rights of the National? The whole argument of the
138 American under this heading is based upon the assumption that the deposit of Groesbeck was the Treasurer's personally, and that he is entitled to all dividends paid by the receiver. The County could not have received dividends upon that portion of the deposit represented by the repayment to it of the $125,000.00 by the National Surety Company, and the American can therefore acquire by its assignment from the County no such right. The indemnity agreement taken by the National from the bank was taken for the protection of the former, particularly in the event that the bank failed. Its failure does not destroy the rights of the National to follow and recover its loss from the assets of the bank, which right was expressly reserved to the National in the said Indemnity agreement. Throughout its discussion upon this point, the American assumes that the Treasurer

and not the County was the depositor and that it would be unfair to the depositor to permit the National to receive dividends either to his exclusion or pro tanto. However, it was the County and not the Treasurer who was the depositor and the County has now been paid in full. Surely neither the bank nor the National assumed two obligations when the bank received this deposit one to Salt Lake County and another and separate obligation to the Treasurer.

It would follow from the argument made by the American that if the Treasurer chose not to enforce the depository bond, it being his personal property, that the county could not step in and enforce the same; that as a matter of fact, it could not enforce it at all, but would have to stand by and look to his official bond in the sum of $200,000 for the repayment of its entire deposit. Such is not the law, nor was it the intent of the legislature when it passed the statutes relating to the treasurer's duties and obligations and Section 4500 relating to the deposit of public moneys.

The American argues that it undertook to protect the County but it did not undertake anything in connection with the bank or enter into any agreement except to act as surety for the Treasurer to the County. Such is not the case, for, as pointed out in our original brief, the American promised and agreed that the Treasurer would faithfully perform all official duties required of him, among which was his duty to comply with Section 4500 and thereby fully protect the public funds. Furthermore, the Supreme Court of Utah in the case of Salt Lake County vs. American Surety Company, 222 Pac. 600, which was the action based upon its bond here in question, held that the American Surety Company was liable for the loss of the public funds occasioned by the failure of the bank."

Mr. Jensen: Commencing on page 33, with the Number 4, near the bottom of the page, and continuing over to the top of page 34, ending with the phrase, "and direct cause of the loss to his surety."

(The portion of Exhibit 9 so designated by counsel and offered is as follows:)

"4. That by its payment of the penalty of its bond in the sum of $125,000.00 to Salt Lake County, the National Surety Company became subrogated to the rights of Salt Lake County against said Bank, and that its right of subrogation from Salt Lake County, together with its legal rights arisinig

from the indemnity agreement executed by the said Bank, are superior to any rights of the American Surety Company, and that the National Surety Company is entitled to be repaid in full before the surety of the Treasurer, whose failure to protect the public funds was the proximate and direct cause of the loss to his surety."

Mr. Jensen: If the Court please, out of an abundance of caution, I ask permission to offer from Exhibit 3, at page 89, the bond Exhibit 14. I am offering it as part of this record to show that it is the same bond that was offered in the other case.

The Court: It may be received.

139 (The portion of Exhibit 3 so designated and offered by counsel, is as follows:)

"Depository Bond.

Know All Men By These Presents: That The National City Bank of Salt Lake City, Salt Lake County, Utah, as Principal, and The National Surety Company, a corporation of the State of New York, as Surety, are held and firmly bound unto Edward J. Groesbeck, Treasurer of Salt Lake County, Utah, in the sum of One Hundred and Twenty-Five Thousand ($125,000.00) Dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our and each of our successors and assigns, jointly and severally by these presents.

Dated the Third day of January, A. D. 1921.

Whereas, The said principal The National City Bank of Salt Lake City, has applied for a part of the funds in the treasury of the County of Salt Lake, State of Utah, to be deposited in said bank, the amount whereof shall be subject to withdrawal or diminution by said treasurer as the requirements of said County of Salt Lake shall demand, and which amount may be increased or decreased as the said treasurer may determine; and

Whereas: the said Bank, in consideration of said deposit and for the privilege of keeping the same, has agreed to pay to the said County of Salt Lake, State of Utah, interest on such sum at a rate not less than two per cent per annum, on

the amount of said deposit, the same to be credited and paid monthly upon the daily average of such amount as the said bank shall have on deposit for the month, or any fraction thereof, next preceding the crediting or payment of said interest, which interest shall be computed and credited to the account of the Treasurer of Salt Lake County and shall become thenceforth a part of such deposit.

Now, Therefore, if the said The National City Bank of Salt Lake City shall, at the beginning of each and every month render to the said Edward J. Groesbeck, Treasurer, a statement, in duplicate, showing the daily balance of the County of Salt Lake's money held by it during the month next preceding, and the interest thereon, and how the same has been credited, and shall well and truly keep all said sums of money so deposited or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of the said Edward J. Groesbeck, Treasurer, as aforesaid, and shall pay over the same, and any part thereof, upon the check or written demand of the said Edward J. Groesbeck, Treasurer, and to his successor in office as shall be by him demanded, and shall calculate, credit and pay said interest as aforesaid, and shall in all respects, save and keep the said Edward J. Groesbeck, Treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue.

Provided, that, if the said Surety shall so elect, this bond may be cancelled at any time by giving thirty days notice in writing to the said Treasurer, and to the persons authorized by law to approve of such bonds, such notice to be accompanied by a sworn statement of all facts and setting forth the reasons in connection with such request for cancellation, and this bond shall be deemed cancelled at the expiration of said thirty days, and said Surety remaining liable for all or any acts covered by this bond which may have been committed by said The National City Bank of Salt Lake City, up to and including the date of expiration of said thirty days notice. The said surety shall, upon the surrender of this bond and its release from all liability thereunder upon request refund this premium paid, less a pro rata part thereof for the time this bond shall have been in force.

Signed and sealed, the day and year first above written.

THE NATIONAL CITY BANK
SALT LAKE CITY
By H. J. Wallace,
Vice President.

140 NATIONAL SURETY COMPANY,
By J. B. Moreton,
Its Attorney-in-fact."

Attest:
F. M. Pingree, Cashier.

Mr. Ray: If the court please, I would like to refer again to the defendants Exhibit 10, and to page 8 thereof, and call attention of the court to the fact that we rely upon the following language, beginning in the fifth line from the bottom of page 8: "Balance due County to pay it in full, and which amount was conceded to it by all parties, and has been paid to it out of dividends here in controversy, $47,666.01."

The Court: It may be received.

Mr. Moreton: Do I understand all of these records, the entire Transcript and two briefs that have been offered here, are in evidence?

The Court: I understand they are in the record, that is, they are available for you, but it is understood that they will not be transcribed by the stenographer or even printed in the record on appeal, except as you designate.

Mr. Moreton: Then I may point out any portion thereof on argument, or have any portion included in the record in any appeal that may be taken.

EDWARD J. GROESBECK, one of the defendants, was sworn and testified on direct examination as follows:

My name is Edward J. Groesbeck and I am now County Treasurer of Salt Lake County and have held that office since January 3, 1921. Out of the third dividend paid by the Receiver, I received under the decree of this Court, on behalf of Salt Lake County, the sum of $47,666.01. Since that time there has been paid checks which were issued in my name and which I have endorsed to Walker Brothers Bank on account of this deposit, in the sum of $9,143.41 and two ten

per cent dividends of $56,809.42 each. Other than that, I have received no money from the Receiver by way of dividends on my deposit in the National City Bank. That money has been deposited with Walker Brothers Bank
141 and I have not received any part of it. Outside of the application of those funds on the claim of the American Surety Company for the $223,000 it paid as my surety, nothing has been paid on its claim, so far as I know. I have not paid anything personally on its claim, so that the balance, except for that amount, of its claim is unpaid.

Cross-Examination of Mr. Groesbeck

By Mr. Moreton:

Exhibit 11 is the Receiver's Certificate that was issued on account of the deposit of Salt Lake County in the National City Bank and is in the amount of $568,094.29.

Mr. Morteon: We offer in evidence Exhibit 11.

The Court: It may be received.

Mr. Moreton: It is in printed form, a copy of which could be supplied except this portion written across the face of it in red ink, which is as follows:

"(a) This claim is secured by bonds of the Crystal Lake Farms Company of the par value of $360,000, delivered for that purpose to the said E. J. Groesbeck as such county treasurer by the National City Bank of Salt Lake City, Utah.

(B) Under depository bond guaranteeing to said E. J. Groesbeck as county treasurer of said Salt Lake County, Utah, deposits in the National City Bank of Salt Lake City, Utah, the Massachusetts Bonding and Insurance Company and the National Surety Company of New York claim to be subrogated to the rights of said E. J. Groesbeck as such County Treasurer in and to this claim as follows:

The first named company, to the extent and by reason of its payment on the 2nd day of June, 1922, to said E. J. Groesbeck as such County Treasurer of the sum of $25,000 under its depository bond No. D 16362. The last named company to the extent and by reason of its payment an the 10 day of June 1922 to said E. J. Groesbeck as such County Treasurer of the sum of $120,000 under its depository bond No. 3206907-C1 20466. Signed Edward E. Jenkins, Receiver."

(Exhibit 11 offered and received in evidence, except for the red ink notations across the face above copied into the record, is in words and figures as follows:)

"Important. Do not lose this certificate. It must be presented when each dividend is paid.

Pr.
THE NATIONAL CITY BANK LL.
OF SALT LAKE CITY, UTAH. LL.
Sch

Receiver's Certificate of Proof of Claim.

No. 1072 Salt Lake City, Utah, Sept. 3rd, 1923.

142 This is to certify, That E. J. Groesbeck County Treasurer has this day made legal and satisfactory proof that E. J. Groesbeck County Treasurer [—] creditor of the National City Bank of Salt Lake City, Utah, to the amount Five Hundred sixty eight thousand ninety-four dollars and twenty nine cents, upon the following claim, to-wit:

	Dollars Cents.
Balance due on open account, subject to check 873-4-5-6-7-8-9-30-1-2-3-4-5-6-	568,094.29
Balance due on Savings Account	
Certificate of Deposit No. .... issued by the National City Bank of Salt Lake City, Utah.	
Certificate of Deposit No. .... issued by the National City Bank of Salt Lake City, Utah.	
Interest on Certificate of deposit No. .... issued by the National City Bank of Salt Lake City, Utah.	
Interest on Certificate of deposit No. .... issued by the National City Bank of Salt Lake City, Utah.	
Unpaid draft No. .... issued by the National City Bank of Salt Lake City, Utah, on	
Protest fees on draft No. ..... issued by the National City Bank of Salt Lake City, Utah.	
Unremitted collection No.	
Total	568,094.29

and E. J. Groesbeck County Treasurer or the lawful assignee of this claim, will alone be entitled to the dividends thereon.

No assignment of this claim or any portion thereof, will be recognized in the payment of dividends, unless notice of such assignment is given to the receiver and entered upon his books before such dividends are declared, as evidenced by his endorsement hereon. This certificate is to be surrendered to the receiver upon the payment of final dividend.

EDWARD E. JENKINS,
Receiver of the National City Bank
of Salt Lake City, Utah.

(On the back thereof the following)

....., 192..

For value received ..... hereby assign the within claim to .....

Witness .....

Entered 192

....., Receiver.

A dividend of $56,809.42, being dividend #3, having accrued on account of the within claim and a dispute having arisen between E. J. Groesbeck, Treasurer, and certain bonding companies as to who should receive said dividend, said dividend was, by E. E. Jenkins, Receiver, paid into the United States District Court of the District of Utah, in the
143 case of Salt Lake County et al vs. E. E. Jenkins, Receiver, and said Court in said action having made and entered its order on May 28, 1924, directing that $47,666.01 of said $56,809.42 be paid forthwith to E. J. Groesbeck as Treasurer of Salt Lake County, the said Receiver has this day paid to said E. J Groesbeck as Treasurer the sum of $47,666.01 and caused said payment to be endorsed on the within certificate and said E. J. Groesbeck acknowledges receipt of said sum in full compliance with said order of said Court.

May 29, 1924.

EDWARD E. JENKINS, Receiver,
By Lawrence H. Heath.

Paid balance ($9,143.41) pursuant to stipulation Nov. 7, 1924.

EDWARD E. JENKINS, Receiver,
By Lawrence H. Heath.

Paid $56,809.42 under terms of stipulation of May 7th, 1925, to E. J. Groesbeck, Treasurer.

EDWARD E. JENKINS, Receiver,
By Lawrence H. Heath.

No. 1072
The National City Bank of Salt Lake City, Utah.
Receiver's certificate of proof of claim for $568,094.29.
Name E. J. Groesbeck, Co. Treasurer.

Dividends on within claim have been paid as follows:

First dividend, 20 per cent, paid Sept. 6, 1922. H. E. J.
Second dividend, 10 per cent paid Feb. 27, 1923, H.
Third Dividend, 10 per cent, paid May 29, 1924, H.
Fourth dividend, 10 per cent, paid Nov. 8, 1924, H.
Fifth dividend, 10 per cent, paid May 7, 1925, H.
Sixth dividend, .. per cent, paid
Seventh dividend, .. per cent, paid,
Eighth dividend, .. per cent, paid
Ninth dividend, .. per cent, paid
Tenth dividend, .. per cent, paid."

Cross-Examination of Mr. Groesbeck continued

By Mr. Moreton:

The National Surety Company paid to Salt Lake County on account of its bond that is herein sued on, the sum of $125,000.00. That amount does not appear to be credited on this Receiver's Certificate. At the time of the payment by the National Surety Company of the sum of $125,000.00 the penalty of its bond, I gave a letter to that surety company which is shown in defendants' Exhibit 3 at page 63.

(Said letter was offered and received in evidence and is as follows:)

"Salt Lake County,
Treasurer's Office,
E. J. Groesbeck, Treasurer.

Salt Lake City, Utah
June 5, 1922.

144 National Surety Company,
115 Broadway
New York City, N. Y.

Gentlemen:

In receiving your check for $125,000.00 in full payment and discharge of all liability, claim or demand under your certain bond in which the National City Bank of Salt Lake City, Utah, is principal, and you are surety, bearing date of January 3rd, 1921, in the sum of $125,000.00 in favor of the undersigned, conditioned for the payment of moneys deposited in said Bank, as in said bond provided, it is understood that the question of the extent of your subrogation to the rights of the undersigned and of Salt Lake County, is left open for future determination; it being my contention that your Company is not entitled to subrogation until and in the event I have been first reimbursed in full to the extent of my entire claim against the National City Bank, and I understand that it is your contention that your Company is entitled to subrogation pro tanto immediately upon payment to me of the above amount, regardless of whether or not I am first reimbursed in full.

Your payment is, therefore, made and received as aforesaid without prejudice to your rights or contention and the question of the extent of your subrogation is therefore left open for future determination.

Yours very truly,

E. J. GROESBECK
Treasurer Salt Lake County."

I wrote that letter to the National Surety Company at that time and delivered it to them.

(The Resolution of the Board of County Commissioners of Salt Lake County, passed at the time of the payment of the said sum of $125,000.00 by the National Surety Company, was received in evidence and is as follows:)

"Resolution.

Resolved that for and in consideration of the sum of $125,000.00 to Salt Lake County in hand paid by the National Surety Company of New York City, hereinafter called the surety, the receipt of which is hereby acknowledged, Salt Lake County does hereby release and discharge the said surety from all liability, claim or demand under its certain bond in which the National City Bank of Salt Lake City, Utah, is principal and it is surety, bearing date on or about January 3rd, 1921, in the penal sum of $125,000.00 in favor of E. J. Groesbeck, Treasurer of Salt Lake County, Utah, conditioned for the payment of moneys deposited in said bank as in said bond provided.

Be it further resolved that in accepting said payment as aforesaid, the question of the extent of subrogation of said National Surety Company to the rights of Salt Lake County is left open for future determination, and the said payment is received without prejudice to the claim of the said Surety Company to subrogation pro tanto to the rights of Salt Lake County against said National City Bank and its Receiver, as said claim is not thereby conceded by said County, said question being left for future determination."

At the time of the failure of the bank, there was on deposit some $643,014. and some odd cents. In drawing against that account, I was required by law and by the bank as well to secure the counter-signature of the County Auditor on
145 all checks drawn by me. As a matter of fact, I had occasion to draw few checks on this account, that is, comparatively few. All warrants drawn against this bank account in the payment of salaries to employees of Salt Lake County and for bills incurred by it, are drawn and signed by the County Auditor and not the Treasurer. In other words, the Auditor drew all checks and warrants against this account, except as it might be necessary to transfer to the state or other political subdivisions of the state, their portion of the tax money collected, and then in such event I drew the check but was obliged to have the counter-signature of the County Auditor. Therefore, all bills, County Bills and County expenses, were paid for by the Auditor drawing the warrants against this deposit.

The Court: I suppose that is the law, isn't it? The statute requires it?

Mr. Moreton: That is the law.

Redirect Examination of Mr. Groesbeck

By Mr. Jensen:

In this matter of handling County funds, that is, the checking of it out, the Auditor draws his warrant on me and I countersign it before it is payable at the bank. Without my counter-signature, the warrant of the Auditor would not be payable, and no money could be checked out of the National City Bank without my signature. As a matter of practice, I do not know of any check of the county or any warrant of the County Auditor being honored by the National City Bank against the deposit except it was countersigned by me.

The Court: Does the law require it to be done that way?

Mr. Jensen: That is my understanding of it.

Mr. Moreton: The law requires that every warrant drawn by the County Auditor shall be registered by the Treasurer, and for that purpose he countersigns as to whether or not there are funds available, but the law requires the auditor and he alone to draw against this account.

The Court: That is, he takes the initiative?

Mr. Moreton: Yes.

146 The check for $125,000.00 paid by the National Surety Company was made to me as County Treasurer. In order to make the County whole both as to principal and interest, I applied toward doing that the payment made by the National Surety Company of $125,000.00, the payment by the Massachusetts Bonding & Insurance Company of $25,000.00, and the payment made by the Fidelity & Deposit Company of $75,000.00, plus also the first dividend of twenty per cent, the second dividend of ten per cent, and then the $47,666.01 out of the third dividend, in accordance with the decree of the Court. It took the payments made by the three bonding companies above mentioned, the first dividend of twenty per cent, the second dividend of ten per cent, the $47,666.01 out of the third dividend, together with the $223,000 paid by the American Surety Company to make the county whole. It took all that money to pay up the county as to both principal and interest. The only money that has been available since to apply on the claim of the American in accordance with the decree of this Court, are the two dividends of ten per cent each and the $9,143.41 balance out of the third dividend.

Recross Examination of Mr. Groesbeck

By Mr. Moreton:

The check of the National Surety Company in the sum of $125,000.00 was not made to me personally but as Treasurer of Salt Lake County. I don't recall whether the National Surety Company required the endorsement of that check by Salt Lake County by its Auditor and Chairman of its Board before the check was paid.

Mr. Jensen: It is in evidence; it appears at page 98 of the transcript; we have already offered it.

Mr. Moreton: Counsel is in error about that. At page 98 of the abstract does appear a check to E. J. Groesbeck as treasurer of Salt Lake County, where it is recited "In
147 full payment of all liability of National Surety Company under its bond dated January 3, 1921, for $125,000.00 covering the funds of the county of Salt Lake, Utah, on deposit in the National City Bank, Salt Lake City, Utah; it being understood by this payment the said National Surety Company is subrogated to all of said county's right, title, interest and claim of, in to or upon the said deposit to the amount of the payment herein made, $125,000.00."

The Court: You say that is not the check?

Mr. Moreton: I don't want counsel to be misled in the matter. That is not the check.

The Court: Have you got it?

Mr. Moreton: No; it would be in the home office.

The Court: Off of the stand, he and you check up and see if you can refresh your recollection and get it straight. All we want to know is what the fact is. Did you get that check back, or your client?

Mr. Moreton: That check was issued by the home office of the company in New York; once having been paid it would be returned to the office in New York; I haven't it.

The Court: You will have to see if you can get together on your recollection. Anything further?

Mr. Moreton: I have nothing further with this witness.

Mr. Jensen: We rest, your Honor.

The Court: Do you rest?

Mr. Moreton: No, your Honor, there are some matters I would like to offer. Counsel for defendants have made a motion that the case be transferred to the equity side. At the outset of the case I made motions to strike certain portions of the answers of the defendants on the theory that they were immaterial and did not constitute a ground of defense to the complaint, upon my theory of the case, it being an action at law, and further, they have likewise offered testimony going into the equities of the case, to which testimony I have objected as counsel for the plaintiff. Now, then, the case
148 has in effect become one in equity, but in view of my theory of the case, I cannot well request your Honor to transfer it to the equity side, but in view of the fact of your Honor's rulings, I trust the Court will pardon me if I suggest that I think the Court should now, upon its own motion, transfer it to the equity side, subject, however, to our objections heretofore made, because it puts the plaintiff now in an embarrassing situation because equitable defenses have been admitted, which is contrary to our theory, of course, with due respect to the Court. So while I cannot now ask the Court to transfer it,it would be inconsistent—I think the Court should, in justice to the plaintiff, now made an order transferring it, subject to our objection.

The Court: When I finally get through and decide the case, the way I will decide it will indicate what I consider material. If I decide it on your theory, I will wholly disregard the equitable defenses; if I maintain the equitable theories, I will decide it as such and order it transferred, if necessary. I will make such formal order as is necessary to preserve the record. If I should make an order now it would be purely arbitrary, because I am not sufficiently advised as to the merits of these equitable issues to say whether they should recover or should not. Have you any rebuttal that you desire to offer?

Mr. Moreton: Yes, your Honor, Mr. Jenkins was going to give me some figures before they closed their case, or some further information.

The Court: I hope you will understand me with respect to siting as a Court of equity and a court of law. By stipulation I am sitting here as a court of law. By virtue of certain equitable issues raised in the pleadings, I am sitting as a court of equity; what I shall finally determine upon the decision of this case will determine whether there are in fact equitable issues really to be considered.

Mr. Moreton: I wouldn't want the Court to decide the case on equitable principles, then if I should be compelled to appeal, find the facts could not be reviewed because I had insisted it was a law case.

The Court: Wouldn't the result of the decision determine that question?

149 Mr. Moreton: I think so.

The Court: Then if necessary that any formal order should be made nunc pro tunc, I will do it.

The defendant EDWARD E. JENKINS was recalled by the plaintiff for further cross-examination and testified as follows:

By Mr. Moreton:

I stated on direct examination that there was a slight change in the amount of claims allowed by the Receiver since the time of the filing of my answer in this case. At the time I file my answer, I allege that in order to pay a ten per cent dividend it would require me to have on hand the sum of $158,382.03. The claims that had been allowed by me as Receiver against the bank at the time of the filing of my answer were of course ten times that figure. I think those figures were in error about $18.00. The actual figures of the claims approved taken from the dividend ledger, are $1,583,926.88. That amount in claims has been allowed so far. My clerk in making up his account for Mr. Ray apparently made a mistake when he gave the figures to him. The amount stated in the answer is $1,583,820.30 and the actual amount is $1,583,926.88, a difference of $105.85. It is a clerical error that has crept in. In that figure I do not include the claim of the National Surety Company in this action. The figures I have given are approved claims. I have with me the original copy of the claim presented by the National Surety Company and upon which this suit is founded. It is marked Exhibit 12 and was presented and filed with me on April 10, 1925. That claim has been in my possession and I now produce it in court at your request.

(Exhibit 12 was offered, received in evidence, and is in words and figures as follows:)

In the Matter of the Receivership of National City Bank of Salt Lake City.

Claim of National Surety Company.

150 State of New York,
County of New York—ss.

"H. J. Lofgren, being first duly sworn, deposes and says that he is an officer, to-wit, the Vice President of the National Surety Company, a corporation organized and existing under the laws of the State of New York with its principal place of business at New York City in said state; that as such officer he is its agent and that he is authorized to make this Proof of Claim.

That the claimant National Surety Company was, at all times herein mentioned and is now, engaged in the business of furnishing surety bonds, and during all such times has complied with the provision of the constitution and laws of the State of New York and Utah, so as to entitle it to do business in each of said states.

That the National City Bank is a national banking corporation organized and existing under and by virtue of the laws of the United States and particularly under the act of congress known as the "National Banking Act," and has its office and place of business in Salt Lake City, Utah.

That at all times herein mentioned, Edward J. Groesbeck was and now is, County Treasurer of Salt Lake County, State of Utah; that the laws of the State of Utah, to-wit, Section 4500, requires that the County Treasurer shall, before making a deposit in any bank, require from such depository collateral security or a good and sufficient surety company bond or a personal bond approved by him and sufficient in amount to fully protect such funds.

That while the said National City Bank was actively engaged in the business of conducting a national bank at Salt Lake City, Utah, and prior to the 3rd day of January, 1921, the said Edward J. Groesbeck, being then and there about to deposit funds in said National City Bank, required that the said Bank furnish to him, as a condition precedent to the depositing of the funds of said County in said Bank and as a guarantee of the repayment of the same, a depository bond in the sum of $125,000.00, under the statutory provision referred to.

That the said National City Bank applied to this claimant National Surety Company for such a surety bond, and that as an inducement and the consideration for the execution of said bond by this claimant, and prior to the delivery of the same, the National Surety Company demanded and received from said National City Bank its written indemnity agreement, in which it is provided in part as follows:

'That the Depository will, at all times, indemnify and keep indemnified the Company and save it harmless from and against all claims, demands, liabilities, costs, charges and expense of every kind and nature which it shall at any time sustain or incur and as well from or against all orders, judgments and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money to meet every claim, demand, liability, cost, charge, expense suit, judgment or adjudication against it by reason of the execution of the Bond applied for and before the Company shall be required to pay thereunder.

'That the Depository will immediately notify the Company at its principal offices in the City of New York, of the making of any demand or the giving of any notice or the commencement of any suit or proceeding, or the fixing of any liability which the Company may be called upon to discharge, by reason of the execution of said Bond. * * *

'That the Company shall have the right to look to and rely upon the property of the Depository and its income and earnings, and to follow and recover out of the Depository's property now belonging to it, or which may hereafter belong to it, and the income and earnings thereof, for anything due or to become due the Company under this Agreement, the execution of the said Bond by the Company being for the Depository's special benefit and protection of the Depository's property, its income and earnings.'

151 That the said National Surety Company did thereafter, to-wit, on the 3rd day of January, 1921, make, execute and deliver to said Edward J. Groesbeck, as County Treasurer, and to Salt Lake County, its bond in the sum of $125,000.00, executed by the said National City Bank as principal and by the said Edward J. Groesbeck as such County Treasurer and funds were thereafter deposited by him in said National City Bank. That the said bond contained the following provision:

'Now, therefore, if the said The National City Bank of Salt Lake City, shall, at the beginning of each and every month, render to the said Edward J. Groesbeck, Treasurer, a statement, in duplicate, showing the daily balance of the County of Salt Lake's money held by it during the month next preceding, and the interest thereon, and how the same has been credited, and shall well and truly keep all said sums of money so deposited or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of the said Edward J. Groesbeck, Treasurer as aforesaid, and shall pay over the same, and any part thereof, upon the check or written demand of the said Edward J. Groesbeck, Treasurer, and to his successor in office as shall be by him demanded, and shall calculate, credit and pay said interest as aforesaid, and shall in all respects save and keep the said Edward J. Groesbeck, Treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue.'

That thereafter, the said Edward J. Groesbeck, as such County Treasurer, did make deposits in said National City Bank and at the time of the failure of said Bank on the 17th day of January, 1922, had on deposit in said Bank, of the funds of said Salt Lake County, $643,094.29. That following the closing of said Bank on said day, Edward E. Jenkins was appointed, qualified and acting Receiver of said Bank.

That following the failure of said Bank, the said Edward J. Groesbeck as County Treasurer, and Salt Lake County, made formal demand in writing upon this claimant to make immediate payment to it and to them of the said deposits up to the amount of said bond, to-wit, $125,000.00, and because of said demand and because of the breach of said bond by said National City Bank, this claimant was obliged to and did, on or about the 17th day of June, 1922, pay to said Edward J. Groesbeck and Salt Lake County the said sum of $125,000.00.

That heretofore and subsequent to aforesaid payment, the National Surety Company duly transferred and assigned to the American Indemnity Company, a corporation, of Galveston, Texas, $5000.00 of its said claim of $125,000.00 hereinbefore set forth. From the time of said assignment continously said National City Bank has been and still is indebted to said National Surety Company on account of the matters herein stated in the sum of $120,000.00. No further

or additional assignments or transfers of any portion of said claim has been made and this claimant is the sole and exclusive owner thereof to the extent of said $120,000.00.

That no part of said debt of said National City Bank to this claimant, arising out of said Indemnity agreement, or otherwise or at all, has been paid, that there as no set-offs or counter-claims to the same, and that no assignments have been made excepting as above set forth and that the full amount of said sum of $125,000.00 was, at the time of said payment by this claimant as aforesaid on to-wit, June 17, 1922, and resulting therefrom and from said indemnity agreement and said bond, justly due and owing from said National City Bank to this claimant National Surety Company, and there is now justly due and owing from said National City Bank to this claimant, National Surety Company, said balance in the sum of $120,000.00 and that no part thereof has been paid and that there are no set-offs or counter-claims to the same.

That the said National Surety Company demands that its claim, as above set forth, in the sum of $120,000.00, arising out of the express promise and agreement of said National City Bank to reimburse said National Surety Company and hold it harmless, be allowed and approved and that dividends, in the amount and upon the same basis as heretofore paid to other claimants in the list of common claims and also that all future dividends to be declared and made pay-
152 able to said common creditors, be paid to this claimant ratably with other creditors, upon said sum of $120,000.00.

(Signed) H. J. LOFGREN

NATIONAL SURETY COMPANY
A. C. H. By (Signed) H. J. Lofgren
Vice Prest.

Subscribed and sworn to before me this 31st day of March, 1925.

(Seal) (Signed) WM. M. WEAVER,
Notary Public.
Residing at New York City, N. Y.

My Commission expires:

WM. M. WEAVER
Notary Public for New York County, No. 260

Certificate filed in Kings, No. 98, Nassau, Queens, No. 19

Bronx No. 13, Richmond and Westchester counties

New York County Register's Office No. 6118

Kings County Register's Office No. 6067

Bronx County Register's Office No. 2643

My Commission expires March 30, 1926.

(Rec'd April 10/25)
EEJ Receiver)"

Cross-Examination of Mr. Jenkins continued

By Mr. Moreton:

The Fidelity & Deposit Company has a Receiver's Certificate in the sum of $75,000.00 similar in form to the one that Mr. Groesbeck has. They are drawing their dividends on that. Before I issued that certificate I received from the Fidelity & Deposit Company an assignment from Mr. Groesbeck of that portion of the deposit. The original of that assignment is marked Exhibit 13.

Mr. Jensen: Are you raising any question about the fact that the Fidelity & Deposit wasn't entitled to that under its bond?

Mr. Moreton: Not at all. You gentlemen will argue that it was by virtue of some other arrangement that this company received this money, whereas it is manifest, it shows on the face of it, it is by reason of subrogation.

Mr. Jensen: By reason of its own contract.

(Exhibit 13 was offered, received in evidence and is as follows:)

"Whereas, The Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland and authorized to do business in the State of Utah, did execute its depository bond in the sum of Seventy-five Thousand ($75,000.00) Dollars, in favor of E. J. Groesbeck, County Treasurer, securing the deposit of E. J. Groesbeck, County Treasurer of Salt Lake County,

Utah, and/or Salt Lake County, in the National City Bank of Salt Lake City, Utah; and

Whereas, E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County, acting by and through the said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, had on deposit the sum of Six Hundred Forty-three Thousand, Ninety-four Dollars and Twenty-nine Cents ($643,094.29) in said Bank on the day and at the time it suspended payment, January 17, 1922;

153 Now, Therefore, E. J. Groesbeck, County Treasurer of Salt Lake County, and/or Salt Lake County, hereby acknowledge the receipt of the sum of Seventy-five Thousand ($75,000.00) Dollars paid to it by the said Fidelity & Deposit Company of Maryland and the said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County, hereby subrogate and acknowledge that the said Fidelity & Deposit Company of Maryland is subrogated to the extent of a 7,500,000/64,309,429 share or portion in, to and of all the right, claim and demand of the said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County, against the said National City Bank of Salt Lake City, Utah, and in and to the same proportionate share of any and all right to preferred payment out of and other preference right in or to, the assets of the said Bank which said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County, may have as sovereign or otherwise, including any right or claim against said Bank, its successors and assigns, and against any receiver of said Bank or any State Bank Examiner in charge of said Bank in his official capacity and against each and every stockholder, officer and director of said Bank as its and their liability may at any time hereafter be established: and it is further the intent hereof that the said Fidelity & Deposit Company of Maryland, its successors and assigns, shall be entitled to collect and receive 7,500,000/64,309,429 of any dividend or payment upon the amount of the Bank balance standing to the credit of E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County in said Bank, and to demand, collect and receive the same proportion of any and all dividends which may be declared or become payable on account of the same or on account of the sum due to the said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County, because of said deposit and to take all or any proper steps or proceedings to obtain payment of such proportionate share of said sum; and it is further the intent hereof that the said Fi-

delity & Deposit Company of Maryland is hereby subrogated proportionately with others as their rights may appear to the extent of Seventy-five Thousand ($75,000.00) Dollars to any right which E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County may have to share in any excess either of collateral held by the Treasurer to secure said county deposits or which may arise from the enforcement of a certain excess deposit bond dated on or about the 26th day of November, 1921, and signed by G. W. Lambourne, F. M. Pingree, J. Wm. Knight, and seven others, and said Company reserves the right to share in such excess.

The said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County, do hereby warrant that it had on deposit to its credit with the said National City Bank at the close of business on the 17th day of January, 1922, the sum of Six Hundred Forty-three Thousand, Ninety-four Dollars and Twenty-nine Cents ($643,094.29) and that no part of said deposit has been withdrawn since said last named date, and that said National City Bank was on said last named date and is on the date hereof, indebted to the said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County in the sum of Six Hundred Forty-three Thousand, Ninety-four Dollars and Twenty-nine Cents ($643,094.29) and that the said National City Bank has now no counter-claim of any kind, character, or description against the claim of said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County as hereinbefore set forth.

This receipt and assignment is executed and delivered for the purpose merely of effectuating in so far as it is possible now to do, such rights as are conferred upon said Fidelity & Deposit Company of Maryland under the 'seventh' paragraph of said depository bond, it being neither the intent nor purpose hereof to either limit or enlarge upon the same.

In Witness Whereof, the said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County, have caused these presents to be executed this 5 day of May, 1922.

(Signed) E. J. GROESBECK,
County Treasurer of Salt Lake County.

COUNTY OF SALT LAKE, UTAH.
By (Signed) E. J. Groesbeck,
Treasurer.

154 I carry on the books of the bank as being the property of the bank and a part of its assets this $360,000.00 par value of Crystal Lake Farm Company bonds.

Redirect Examination of Mr. Jenkins

By Mr. Ray:

I do not carry among my claims, which are about a million and a half or a little better, the claim of the National Surety Company nor that of the Massachusetts Bonding & Insurance Company. If I were required to pay such sums as I hereafter realize from my trust to the National Surety Company and the Massachusetts Bonding Company, they would have to be added to our list of claims. In the event that they should become added by reason of the judgment of this Court and I realize fifteen per cent more on the assets, that fifteen per cent concerning which I have testified, is figured on the basis of the present claims.

Q. What percentage do you think you would then be able to pay the common creditors of the bank?

Mr. Moreton: I object to it as immaterial, irrelevant and incompetent. If these claims are to be allowed it matters not how much would be paid to the creditors of the bank; this claim, I take it, should stand on its own merits.

The Court: That would all depend on a matter of mathematics. If he has figured it out, he may answer.

Mr. Moreton: Save an exception.

If the sixty per cent were paid on the $150,000.00 of these two bonding companies, that would take $90,000.00 immediately away from us. It would take $90,000.00 to let them catch up with the rest. That would leave about seven per cent to be paid on the spread over the whole obligation, instead of fifteen per cent. Others who have claims against the bank which have been allowed would receive sixty-seven per cent instead of seventy-five per cent. Of course, these figures are purely a matter of mathematical computation. While there is nothing absolutely sure about my paying another fifteen per cent, yet that is my best judgment and estimate.

155 Exhibit 14, a letter written and delivered to Walker Brothers Bankers, of date November 6 1925, was offered by plaintiff and received in evidence and is as follows:

"November 6, 1925

Walker Bros. Bankers
City.

Gentlemen:

For the purpose of saving interest on the money heretofore deposited with you by Edward E. Jenkins, as Receiver of the National City Bank, the National Surety Company and American Indemnity Company hereby consent that payment thereof be made to the American Surety Company, but does so without prejudice or waiver of any of its rights against the American Surety Company, E. J. Groesbeck, the National City Bank and its Receiver, particularly without prejudice or waiver of the rights claimed by it in the suit brought by it against Jenkins, Receiver, of said Bank now pending in the U. S. District Court for Utah.

This letter is written in this form for the purpose of protecting any rights we may have, as above set forth, but nevertheless the payment hereby authorized shall forever release and discharge you from any and all liability to the undersigned by reason thereof.

Yours truly,

A. E. MORETON
Attorney for National Surety Company and American Indemnity Company."

A E M N G

Mr. Moreton: We offer in evidence Exhibit 15, which is a copy of the decree of the Court in the prior action, prepared and served upon the National Surety Company by Cheney, Jensen, Holman and Stephens, attorneys for American Surety Company, which decree is prepared upon their stationery, with the name of the firm printed at the bottom thereof. The purpose of this offer is simply this, the American Surety Company have offered various arguments and portions of pleadings and evidence on the part of the National Surety Company to show this matter is res judicata. We now offer the decree prepared by that firm upon their stationery to show that their theory of the former case was that nothing was involved in that case but the right of subrogation and they prepared no finding or decree as to the indemnity agreement. Will you admit that this was a copy of the decree which you served upon the National Surety

Company, this Exhibit 15, prior to its delivery to the Court for its signature?

The Court: You want them to admit that they prepared and brought into Court the decree which the Court signed, and that they asked the Court to sign the same?

156 Mr. Jensen: There is no question about that, your Honor.

The Court: Isn't that sufficient to cover your ground?

Mr. Moreton: Yes.

Mr. Ray: May it be stipulated, your Honor, I ask Mr. Moreton, that Mr. Jenkins as receiver was served by the National Surety Company in the other case with notice of each step in the proceedings beginning with the appeal to the Circuit Court of Appeals right straight through to the service upon the receiver of the notice of intention to apply for a writ of certiorari in the Supreme Court?

Mr. Moreton: The record shows that. The court has stated we may have the benefit of the records here that were used in the former case—perhaps I better offer so we will have this complete—I think it will be just as well—in the argument we have the whole record, not just part of it.

(Exhibits 16, 17 and 18 marked by the reporter)

Mr. Moreton: We offer in evidence, your Honor, Exhibit 16, which is the brief of the appellee American Surety Company in the Circuit Court of Appeals.

Mr. Jensen: No objection.

Mr. Ray: No objection.

The Court: It may be received.

Mr. Moreton: We offer in evidence Exhibit 18 which is the petition for re-hearing filed by the National Surety Company in the Circuit Court of Appeals.

Mr. Jensen: No objection.

The Court: May be received.

Mr. Moreton: We offer in evidence Exhibit 17 which is the petition for writ of certiorari filed by the National Surety Company in the Supreme Court of the United States.

Mr. Ray: No objection. May it be agreed each of those documents were served upon Mr. Jenkins as receiver?

Mr. Moreton: It doesn't show here.

Mr. Jensen: We will stipulate they were.

157 Mr. Ray: They were, were they not?

Mr. Moreton: We will stipulate each of those documents was served upon the Receiver Jenkins.

The Court: Let the record so show.

Mr. Moreton: I desire to offer an amendment to the reply of the National Surety Company, copy of which I have just handed to the Court, wherein we ask permission to amend our reply by adding thereto paragraph 25A. I desire to file this without waiving our motions to strike and in the event the Court should deny my opinions to strike portions of the answers of the defendants.

Mr. Jensen: We object to the filing of it because it is matter that is totally new matter, bringing in a totally new issue; no testimony has been submitted on it and we have not presented any evidence on it; it comes too late after both parties have rested to introduce a totally new issue that was not in the case at all before.

Mr. Ray: May I add to the objection in behalf of the Receiver, if the Court please, in addition to the objection urged by Mr. Jensen, the receiver objects to it on the ground it is immaterial and irrelevant and incompetent also as to the receiver.

The Court: I think I will let you file it.

Mr. Jensen: May we have an exception then for the sake of the record?

The Court: It may stand denied as if you had filed a written reply.

Mr. Jensen: May the plea of res judicata which we have made extend to this so there is no question about that?

The Court: Certainly.

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158 Plaintiff National Surety Company designated and offered in evidence that part of Exhibit 3, same being the Transcript of Record on Appeal to the Circuit Court of Appeals in the case of National Surety Company appellant v. Salt Lake County, et al., No. 6819, and the same was received in evidence, as follows:

On pages 51 to 53 thereof, as follows:

"The Court: What is the fund that the receiver has, how much is left?

Mr. Ray: $9,143.00.

Mr. Moreton: Out of the present dividend.

Mr. Jensen: The situation is this, as I understand it, the receiver contemplates paying another dividend in the immediate future of 15 per cent, isn't it?

The Court: What I was getting at is of this fund, how much—

Mr. Jensen: The whole thing is before the court, as I understand it, under the cross complaint now, your Honor, and there has also been brought in by the cross complaint the question of the right between the surety companies to the balance of any dividends which may be paid, so we desire all of the surety companies to have an adjudication of their rights with respect to that fund.

The Court: Will someone make a statement of the issue?

Mr. Jensen: To outline the case briefly, your Honor, the situation is this, there was deposited in the National City Bank, a National Bank located in this City, by Mr. Groesbeck, as County Treasurer, at the time the bank failed, the sum of $643,094.29. The County, with this payment which has been authorized by stipulation, will have been reimbursed in full, there having been paid to it also certain amounts, by the National Surety Company, $125,000.00; by the Massachusetts Bonding Company $25,000.00, and by the American Surety Company the sum of $223,000.00 and odd dollars; of that $200,000.00 was principal, and twenty-three thousand and odd dollars was interest.

The result of all those payments is that the County is now made whole.

Mr. Groesbeck as County Treasurer, gave an official bond to the County in the sum of $200,000.00. That bond was written by the American Surety Company. The National City Bank gave as depository bonds a bond from the National Surety Company represented by Mr. Moreton here, in the sum of $125,000.00, a bond for $25,000.00 from the Massachusetts Bonding Company represented by Mr. Ray, which has been paid,—both of those having been paid; and then there was one from the Fidelity & Deposit Company for

$75,000.00, but they are not taking any part in this litigation, as I understand it. They had a direct contract that they were entitled upon payment of their amount to immediately begin sharing in dividends.

Mr. Moreton: That was in the bond itself. So they had a special contract for immediately sharing in dividends when they paid their amount.

Mr. Jensen: At any rate, they are not in this litigation and as I understand it are not making any claim to the fund. In addition, as depository security, Mr. Groesbeck held and received from the bank $360,000.00 par value Crystal Lake bonds. He has assigned those bonds to the American Surety Company. This litigation as it now stands is purely litigation between the official bondsmen, the American Surety Company on the one side and the Massachusetts Bonding Company and the National Bonding on the other, who gave bonds—the National gave a bond to Mr. Groesbeck procured by the bank to protect Mr. Groesbeck. The bond of the Massachusetts Indemnity Company was a bond both to Mr. Groesbeck and to the County, the bank being principal, and was also another depository bond."

159 On page 54 thereof as follows:

"The Court: It is a contest between these bond companies as to priority.

Mr. Jensen: That is the case, your Honor."

On pages 55 to 58 thereof as follows:

"CLARENCE COWAN, a witness produced by the plaintiff, American Surety Company, being first duly sworn, testified as follows:

My name is Clarence Cowan. I am the County Clerk of Salt Lake County and have held that position for three years past. I have with me the minutes of the County Commissioners for Friday, February 29th, 1924.

Mr. Jensen: Now, gentlemen, may I simply read this brief extract? I think all of you have examined it. Simply relates to the assignment which we got from the County.

Mr. Moreton: We want to preserve our objection to that, your Honor, upon the ground this is illegal and void as without authority of law, of no effect, for the reason that our rights had already accrued at that time.

The Court: The objection will be overruled.

Mr. Moreton: Save our exception.

Mr. Jensen: (Reads)

'Friday, February 29, 1924'—and that sheet is headed: 'Minute Book, Board of County Commissioners, Salt Lake County.'

'Mr. Frank Holman of the firm of Cheney, Jensen, Holman & Stephens appeared before the Board with a modified assignment of the County's interest to the dividend recently declared to the creditors of the National City Bank, and after discussion roll was called upon the request that the chairman of this Board of County Commissioners be authorized to sign said assignment, and the vote thereon was as follows:

Commissioner Stenaker Aye.
Commissioner Lindsay Aye.
Commissioner Burgon Aye."

(Exhibit No. 1 Marked by the Reporter).

The signature on Exhibit 1, I can identify as being the signature of E. J. Groesbeck, County Treasurer of Salt Lake County, and E. L. Burgon, Chairman of the Board of County Commissioners.

Mr. Moreton: No question about the signatures, but we object to the offer of Exhibit 1 for the same reason.

The Court: Same ruling.

Mr. Moreton: Exception.

'Assignment of Claim.

'Whereas, E. J. Groesbeck, as County Treasurer of Salt Lake County, had on deposit in the National City Bank on the date when said bank passed in the hands of a receiver, the sum of Six Hundred Forty Three Thousand Ninety Four 29-100 Dollars ($643,094.29), and

'Whereas, said E. J. Groesbeck has heretofore made an assignment of all his right to dividends of said bank in the sum of Seventy Five Thousand Dollars ($75,000.00) of said deposit, and'

Mr. Jensen: I suppose we can stipulate that it is the Fidelity Deposit Company that got that assignment?

Mr. Moreton: Yes.

Mr. Jensen: (Reads)

'Whereas, the American Surety Company of New York has paid to said E. J. Groesbeck as Treasurer of said Salt Lake County and to said Salt Lake County, the sum of Two Hundred Thousand Dollars ($200,000.00) as Surety upon the official bond of said E. J. Groesbeck as said Treasurer of Salt Lake County, and

'Whereas, said Salt Lake County has received from certain depository sureties and by way of dividends from said receiver, further sums from time to time, and its claim against said receiver by reason of said deposit is now reduced to the sum of Forty Seven Thousand Six Hundred Forty Six and 01-100 Dollars ($47,666.01) and

160 'Whereas, the receiver of said bank has on hand declared and set apart as a dividend payable on said claim, the sum of Fifty Six Thousand Eight Hundred Nine and 42-100 Dollars ($56,809.48), which he declines and refuses to pay over, and

'Whereas, after the further payment to said Salt Lake County and its said Treasurer of the said balance of Forty Seven Thousand Six Hundred Sixty Six and 01-100 ($47,666.01) Dollars, the American Surety Company of New York is entitled to be subrogated to the rights of said Treasurer, and of said County, and of said Treasurer in his individual capacity, on account of said deposit in said bank, as against said bank, and is also entitled to an assignment of all the rights and claims of said County and said Treasurer in and to the Three Hundred Sixty Thousand ($360,000.00) Dollars par value of the bonds of the Crystal Lake Farms Company held by said Treasurer as collateral security for the payment of said moneys represented by said deposit;

'Now, Therefore: For and in consideration of the premises and the sum of One Dollar and other good and valuable consideration, the said E. J. Groesbeck, as Treasurer of Salt Lake County, by and with the approval of the County Commissioners of Salt Lake County, does hereby and said Salt Lake County does hereby, assign, transfer, and set over unto the American Surety Company of New York, the surety on the official bond of E. J. Groesbeck, as County Treasurer, all rights of the said E. J. Groesbeck as Treasurer of Salt Lake County, and of Salt Lake County,

against said National City Bank on account of the balance of said deposit, except only that it is agreed and understood that said Salt Lake County is first entitled to the payment to it of Forty Seven Thousand Six Hundred Sixty-Six 01-100 ($47,666.01) Dollars of said moneys and the undersigned do hereby request the receiver of said bank to make all further payments of moneys on account of liquidation dividends on said claim to said American Surety Company of New York, after said Salt Lake County has received in full said sum of Forty Seven Thousand Six Hundred Sixty Six 01-100 ($47,666.01) Dollars, and said E. J. Groesbeck as County Treasurer of Salt Lake County, and said Salt Lake County, do hereby assign, transfer and set over unto said American Surety Company of New York all its rights and claims in and to the Three Hundred Sixty Thousand ($360,000.00) Dollars par value of the bonds of the Crystal Lake Farms Company held as security for the payment of said moneys represented by said deposit.

'In Witness Whereof the said E. J. Groesbeck as County Treasurer of Salt Lake County has hereunto set his hand and seal, and Salt Lake County has caused this assignment of claim to be executed by the chairman of its Board of County Commissioners, attested by its Clerk, this the 29th day of February, 1924.

'(Signed) E. J. GROESBECK (Seal)
County Treasurer of Salt Lake County.

SALT LAKE COUNTY.

(Signed) E. L. Burgon
(Seal) Chairman Board of County Commissioners.

'Attest:
(Signed) Clarence Cowan, Clerk,
By Fred C. Bassett, Deputy Clerk.' "

On pages 59 and 60 thereof, as follows:

"Mr. Jensen: It was the interest for holding the fund and not paying it immediately after the last dividend was allowed. I take it in view of the statement made, nobody intends to press that claim against the receiver.

The Court: Is that correct? I understood that was true as to Salt Lake County.

Mr. Jensen: As far as the American Surety is concerned, we state to the court we have no disposition to press it.

Mr. Moreton: Likewise true as to the other defendants.

The Court: It is just a contest for the principal sum now in the Receiver's hands?

Mr. Jensen: Yes."

161 The following extract from the testimony of E. J. GROESBECK, Treasurer, at page 78 thereof, as follows:

"I don't know if the American Surety Company required such an assignment before they would pay this $200,000.00. My interest in this matter lies with the American Surety Company, for the reason that if the American Surety Company is successful in establishing its rights of subrogation against the bank, my liability to it by reason of being its principal will be reduced. Other than that I have no interest in which surety company recover the subrogation."

On pages 116 to 133 thereof, as follows:

"Assignment of Error on Appeal of Appellant National Surety Company.

Comes now the National Surety Company, a corporation, one of the defendants above named and says that the decree entered in the above entitled cause on the 12th day of June, A. D. 1924, is erroneous and unjust to the above defendant and assigns the following errors upon which it will rely for a reversal of the said decree, to-wit:

I.

That the Court erred in ordering, adjudging and decreeing 'that the plaintiff American Surety Company of New York have and recover from Edward E. Jenkins, Receiver of the National City Bank, the sum of $9143.41, being the balance of a dividend declared and payable on the claim of Edward J. Groesbeck as Treasurer of Salt Lake County, against said bank,' for the reason that it appears by the evidence in said action and particularly by the depository bond furnished by said defendant National Surety Company to the plaintiffs E. J. Groesbeck as County Treasurer and to Salt Lake County, in behalf of said National City Bank, and from the applica-

tion for said bond executed by said bank, and by the undisputed testimony, that said National Surety Company has paid to said E. J. Groesbeck as County Treasurer and to Salt Lake County the full penalty of its said bond in the sum of $125,000.00; and that said National Surety Company by reason thereof and by reason of its payment of said sum as aforesaid and by operation of law, and in justice, equity and good conscience, became and is entitled to be subrogated to the amount of such payment to all the rights and claims of Salt Lake County and E. J. Groesbeck, its Treasurer, against said National City Bank and said Edward E. Jenkins as its Receiver, and that such claim is superior to any claim on the part of said American Surety Company, a corporation, and for the further reason that the undisputed evidence shows said National Surety Company has a valid claim for reimbursement from the Receiver of said Bank as provided for in said application made by said Bank for said bond, in which application said National City Bank promised to indemnify and hold said National Surety Company harmless from any loss on account of its execution of said bond for said Bank, and that if said American Surety Company has any such right or claim upon the assets or funds in the hands of said Receiver, it is subsequent and inferior to the rights of this defenadnt National Surety Company and must be postponed until such time as said National Surety Company has been made whole by reason of its said payment of $125,000.00 together with interest at the rate of eight percent per annum from the date of its payment of the same on June 5, 1922.

2.

That the Court erred in ordering, adjudging and decreeing that the plaintiff American Surety Company of New York 'is subrogated to and entitled to succeed to the rights of Salt Lake County and of Edward J. Groesbeck, its Treasurer, to all dividends that may become payable on the claim in the sum of $568,094.29 of said Edward J. Groesbeck as Treasurer of Salt Lake County against said National City Bank,' for the reason, etc. * * * *

162 3.

That the Court erred in ordering, adjudging and decreeing that the said plaintiff American Surety Company 'is subrogated to and entitled to succeed to the rights of said Edward J. Groesbeck as Treasurer of Salt Lake County and Salt Lake County, in the bonds of the Crystal Lake Farm Lands Company of the par value of $360,000.00, held by said

Edward J. Groesbeck as collateral security for the deposit of said moneys in said National City Bank, until said American Surety Company of New York shall have received on account of said dividends and/or the proceeds of said bonds, the total sum of $223,362.15, with interest at the rate of eight percent per annum on the principal sum of $200,000.00 from the 29th day of February, 1924 until paid,' for the reason, etc. * * * *

4.

That the trial Court erred in ordering, adjudging and decreeing that the said American Surety Company is entitled as against said defendant Edward E. Jenkins as Receiver to the sum of $223,362.15 and also interest at the rate of eight per cent per annum on the principal sum of $200,000.00 from the 29th day of February, 1924 until paid, for the reason that said plaintiff American Surety Company is not entitled under the law to have its said claim for interest on said sum declared to be superior to and to be paid to it before and in advance of the payment to this defendant National Surety Company of its claim on the amount of $125,000.00 paid as aforesaid.

5.

That the trial Court erred in ordering, adjudging and decreeing that 'the said Edward E. Jenkins as Receiver of the National City Bank, or any Receiver of said Bank is hereby ordered and directed to pay to the said American Surety Company of New York all said future dividends as the same are declared and payable on said claim against said Bank, until said American Surety Company of New York shall have received the said sum of $223,362.15 with interest at the rate of eight percent per annum on the principal sum of $200,000.00 from the 29th day of February 1924 until paid,' for the reason, etc. * * * *

6.

The trial Court erred in ordering, adjudging and decreeing that 'said American Surety Company of New York is hereby authorized to sell and/or otherwise dispose of said bonds and to apply the proceeds thereof to the repayment of said amounts as aforesaid,' for the reason, etc. * * * *

7.

The trial Court erred in ordering, adjudging and decreeing 'that after said American Surety Company of New York shall have received dividends and/or proceeds from said

bonds sufficient to repay to it the said sum of $223,362.15, with interest at the rate of eight per cent per annum on the principal sum of $200,000.00 from the 29th day of February, 1924, until paid, then the interpleaded defendants, National Surety Company of New York, American Indemnity Company and Massachusetts Bonding & Insurance Company, shall participate pro rata in all further dividends declared and payable on said claim and/or all balance of proceeds from the sale or other disposition of said Crystal Lake Farm Lands Company bonds, until the amount of the claims of said interpleaded defendants, as shown by their complaints in intervention, are paid in full, and any balance theerafter remaining shall belong to the Receiver of said National City Bank,' for the reason, etc. * * *

Wherefore, defendant National Surety Company prays that said decree be reversed and the United States District Court directed to enter its judgment and decree ordering, adjudging and decreeing that claim of the National Surety Company against said defendant Edward E. Jenkins as Receiver, in the sum of $125,000.00 and interest from June 5, 1922 at the rate of eight per cent per annum, should be allowed and declared as a prior lien upon the dividends in his hands and to be hereafter declared upon the claim of said Salt Lake County and E. J. Groesbeck, its Treasurer, as against him as Receiver of said National City Bank; and ordering, adjudging and decreeing that the said Edward E. Jenkins, as Re-
163 ceiver, pay to the said National Surety Company the sum of $9143.42 now in his hands as such Receiver, together with all future dividends as the same are declared and payable by him on said claim of said Salt Lake County and E. J. Groesbeck, its Treasurer, against said bank, until said National Surety Company has been paid in full for the loss sustained by it upon said bond executed by it in behalf of said National City Bank; and ordering, adjudging and decreeing that the said National Surety Company is authorized and directed to sell and/or otherwise dipsose of said bonds of said $360,000.00 par value of the Crystal Lake Farm Lands Company, and apply the proceeds thereof toward the repayment of its claim as aforesaid; and ordering, adjudging and decreeing that the plaintiff American Surety Company has no interest in or valid claim upon any of said dividends or of said bonds and shall not participate in dividends declared and payable on said claim and/or the proceeds from the sale or other disposition of said Crystal Lake Farm Lands Company's bonds, until the amount of the claim of

said National Surety Company is first paid in full; and for such other and further relief as to the Court may appear just and equitable.

ARTHUR E. MORETON
Solicitor for Defendant National Surety Company.

Copy of the foregoing Assignment of Error received this 25th day of September, 1924, and we consent that said Assignments of Error may be treated and considered as also the Assignments of Error of the defendant American Indemnity Company.

GEORGE G. ARMSTRONG
Solicitor for Plaintiff, Salt Lake County.

CHENEY, JENSEN, HOLMAN & STEPHENS,
JOHN JENSEN,
FRANK E. HOLMAN,
Solicitors for Plaintiffs American Surety Co. and E. J. Groesbeck.

E. M. BAGLEY,
ROBERT L. JUDD,
PAUL H. RAY,
Solicitors for Defendant Edward E. Jenkins, Receiver.

ROBERT L. JUDD
Solicitor for Massachusetts Bonding & Insurance Company.

ARTHUR E. MORETON,
Solicitor for Defendant American Indemnity Co.

Filed in United States District Court, District of Utah, Sep. 25, 1924 John W. Christy, Clerk"

Plaintiff National Surety Company designated and offered in evidence that part of Exhibit 10, same being the brief of appellant National Surety Company on appeal to the Circuit Court of Appeals in the case of National Surety Company appellant vs. Salt Lake County, et al., No. 6819, and the same was received in evidence, as follows:

164 On pages 1 and 2 thereof, as follows:

"The Question to be Determined.

Briefly, this action grows out of the failure of the National City Bank of Salt Lake City, Utah, and on appeal is a con-

test between the American Surety Comany on the one hand and the National Surety Company on the other hand, as to their respective rights of priority in dividends declared and to be declared by the defendant Edward E. Jenkins, Receiver of said defunct Bank upon the deposit of public funds of Salt Lake County in said Bank, made by E. J. Groesbeck, Treasurer of said County, and amounting to $643,094.29 at the time of the failure of said Bank on January 17, 1922. Salt Lake County has been repaid in full the amount of said deposit by the payment to it of the sum of $225,000.00 by the three surety companies, furnishing depository bonds in behalf of said Bank, by the further payment to Salt Lake County of the sum of $200,000.00 by the American Surety Company upon the official bond of said E. J. Groesbeck, Treasurer, and by the further payment to it by the defendant Receiver of $218,094.29 in dividends.

The action resolves itself into a determination of this question: Is the American Surety Company, which executed for said E. J. Groesbeck, as Treasurer, his official bond to Salt Lake County in the penal sum of $200,000.00, entitled to priority in the payment of further dividends on said deposit, to the exclusion of and before the National Surety Company which furnished Salt Lake County, in behalf of said National City Bank, a depository bond in the penal sum of $125,000.00, receives any reimbursement whatsoever, as decreed by the United States District Court for Utah, or is the National Surety Company and the other surety companies furnishing depository bonds entitled to priority in the distribution of said dividends ahead of said American Surety Company, as claimed by them, or are each and all of these surety companies, including the American Surety Company, entitled to their pro rata share of such dividends, with priority to none?"

On pages 9 to 11 thereof, as follows:

"This action was instituted by the plaintiffs Salt Lake County, E. J. Groesbeck, its Treasurer, and American Surety Company against said defendant, Edward E. Jenkins as Receiver of said National City Bank, for the purpose of determining who is entitled to said fourth dividend of ten per cent, amounting to said sum of $56,809.42, in the hands of said Receiver. The plaintiff Salt Lake County set forth in Complaint that it is entitled to said sum of $47,666.01 in order to make it whole on account of said deposit and the said plaintiff, American Surety Company, claimed that it is entitled to the balance of said dividend together with all future dividends as declared and paid by said defendant Receiver,

together with the Crystal Lake Farm Lands Company bonds of the par value of $360,000.00, or so much of the proceeds thereof as would reimburse it for its said loss paid to said Salt Lake County in said sum of $200,000.00 (Tr. pp. 1-5)

The defendant Edward E. Jenkins, Receiver, filed his answer to said Complainant, admitting payment by said American Surety Company to said Salt Lake County of the liability upon its said bond in the sum of $200,000.00 and that he had in his hands said sum of $56,809.42, and further alleging the payment by said National Surety Company of the penalty of its said bond of $125,000.00 and the payment of the Massachusetts Bonding & Insurance Company of the penalty of its bond in the sum of $25,000.00 and that claim had been made upon him by each of said last two named companies that were entitled to subrogation to the extent of the payment made by each of them on their respective bonds to the rights and claims of Salt Lake County and E. J. Groesbeck, its Treasurer, against said National City Bank, in and to all dividends to be declared by said defendant Receiver, and alleging that the said National Surety Company had assigned and transferred to the American Indemnity Company $5,000.00 of its said claim against said National City Bank, and concluding with a prayer that the Court make an order herein requiring the National Surety Company, American
165 Indemnity Company and Massachuttes Bonding & In-
Insurance Company to set forth their respective claims to said dividend of $56,599.042 held by him, together with all future dividends that may accrue in his hands by reason of the said deposit of Salt Lake County, and that the Court determine the respective rights of each of said parties to said dividends. That thereupon the Court made and entered its order herein interpleading the said National Surety Company, American Indemnity Company and Massachusetts Bonding & Insurance Company, as defendants herein, and requiring them to set forth their respective claims, and that thereupon each of said parties filed their separate answer herein, setting forth their respective claims to said dividend in the hands of said Receiver and to future dividends that may accrue in his hands on account of the said deposit of Salt Lake County (Tr. pp. 7-12).

That the defendant and appellant National Surety Company filed its answer herein setting forth the application made to it by said National City Bank for said bonds, its execution of said bond in behalf of said National City Bank on the 3rd day of January, 1921, the failure of said Bank on the 17th

day of January, 1922, and the payment by said National Surety Co. to Salt Lake County of the penalty of its said bond in the sum of $125,000.00, and alleging that by reason of its said payment as aforesaid, it became, by operation of law, and is entitled to be subrogated to the amount of such payment to the rights and claims of Salt Lake County and E. J. Groesbeck, its Treasurer, against said National City Bank and said Edward E. Jenkins, its Receiver; that said sum of $125,000.00 was paid by it to Salt Lake County and E. J. Groesbeck and received by them without prejudice as to the claim of said National Surety Company to subrogation to the rights of Salt Lake County against said National City Bank and its Receiver to the extent of said payment, said question being left open for future determination; that said E. J. Groesbeck had failed to comply with the provisions of Section 4500 Compiled Laws of Utah, 1917, by not requiring from said Bank full and complete depository protection as required by said section; that Crystal Lake Farm Lands Company bonds of the par value of $360,000.00 at the time they were received by said Groesbeck were not, and at no time since have been worth as much as ten cents on the dollar; that the loss of the funds of Salt Lake County was occasioned by the failure of the said E. J. Groesbeck as County Treasurer, to perform the duty enjoined upon him by law, to require from said National City Bank sufficient depository protection to fully protect the public funds so deposited by him, and that had he complied with said Section 4500, his surety, the American Surety Company, would have suffered no loss; that because of the failure of the said Groesbeck to take, and because of the failure of the said American Surety Company to require him to take, sufficient depository protection, the American Surety Company suffered a loss for which it now seeks to reimburse itself at the expense of the National Surety Company; that equity and good conscience will not permit the said American Surety Company to make use of such illegal and wrongful act on the part of its principal to establish a right to dividends to the exclusion of or superior to that of the National Surety Company. (Tr. pp. 14-22)"

On pages 12 and 13 thereof, as follows:

"Specification of Errors.

The appellant National Surety Company has made eighteen separate Assignments of Error, of which Assignments Nos. 1, 2, 3, 4, 5, 6, 7 and 8, for the purpose of convenience and brevity in discussion, may be grouped together, inasmuch

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as they all relate to the alleged errors of the court in ordering, adjudging and decreeing that the claim of said American Surety Company in the sum of $200,000.00 and interest, is entitled to priority in the distribution and payment of dividends by said defendant Receiver on the said deposit of said Salt Lake County in said National City Bank and that said claim of said American Surety Company is superior to the claim of the National Surety Company for $125,000.00 and interest arising out of its payment of said sum to said Salt Lake County, as aforesaid; and said Assignments of Error are in brief as follows:"

166 On pages 21 and 22 thereof, as follows:

"The claim of the National Surety Company to be subrogated to the rights of Salt Lake County and E. J. Groesbeck, to the dividends on hand and to be paid by the receiver of said Bank, rests upon the well established, equitable principle that: 'A surety paying the debt of his principal is entitled to be subrogated to the rights of the creditor in all or any of the securities, means or remedies which the creditor has for enforcement against his principal.' (25 R. C. L. 1327). The National Surety Company, having paid the debt of its principal, the National City Bank, to the creditor, Salt Lake County, in the sum of $125,000.00, it is clearly entitled, independently of its legal right to reimbursement, to be subrogated to the right of Salt Lake County to the funds in the hands of said Receiver.

The American Surety Company, while recognizing the right of the National Surety Company to subrogation, claims that its right to subrogation is superior to that of the National Surety Company, for the reason that it claims that the said depository bond executed by the National Surety Company runs in favor of and is for the benefit of the Treasurer, E. J. Groesbeck personally, and that by reason of its payment to Salt Lake County of the penal sum of the official bond executed by it to Salt Lake County in behalf of E. J. Groesbeck as Treasurer, it is subrogated to the rights of Salt Lake County against said Bank, and that its claim of subrogation is superior to that of the National Surety Company for the reason that it claims that the said Groesbeck must first be indemnified against loss. * * *

On the depository bond executed by this appellant, National Surety Company, the National City Bank was of course the principal, the National Surety Company the surety, and Salt Lake County the creditor, and upon payment of the pen-

alty of the bond of this appellant, it became subrogated to the rights of Salt Lake County against said Bank to the extent of the amount of its payment. The right of subrogation of this appellant is therefore not only clear, but direct if we may use that expression, and the right of the American Surety Company as against said Bank, if any such right it has, is of necessity circuitous, as it will have to come through Mr. Groesbeck."

On pages 32 and 33 thereof, as follows:

"The omissions of Mr. Groesbeck are chargeable to his surety, who made the broad guarantee in his behalf that he would 'well, truly and faithfully perform all duties enjoined upon him by law.' In view of the manner of the performance of Mr. Groesbeck of his duties relative to this deposit, can it be said that the equities of his surety, which, of course, can be no greater than his own, are superior to those of the appellant National Surety Company, which is wholly without blame in this matter? The latter is an innocent party and had the right to assume that the Treasurer performed this duty enjoined upon him by law, by requiring the National City Bank to give him adequate and full protection in such amount or amounts as might be necessary from time to time, considering the amount of the deposit.

The National Surety Company has complied with the terms of its bond by making good the obligation of its principal, the National City Bank, to pay to Salt Lake County $125,000.00. The measure of its liability is the terms of its bond. But how can the American Surety Company comply with the terms of its bond? True enough, it has paid to Salt Lake County $200,000.00, the penalty of said bond, but how can it make good now the obligation of its principal to comply with the law by taking sufficient depository protection? It is now too late to remedy his failure to do so, but the least that can be required of it, and equity will demand it, is that its right of subrogation, if any, be postponed to that of the National Surety Company. Under the circumstances, can it be said that the American Surety Company comes into Court with clean hands? Is it equitable that the American Surety Company should receive any dividends at the expense of the National Surety Company?

167 The National City Bank owed no duty to the American Surety Company, yet the latter seeks to recover from the Receiver of said Bank because of the failure of its own

principal to perform the duties enjoined upon him by law. In other words, the American Surety Company, would make itself whole out of the funds in the hands of said Receiver for a loss sustained by it on account of the failure of its principal to observe the law, which it guaranteed he would do, and this, too, at the expense of a wholly innocent party. Is this equity?

'It (the right of subrogation) rests upon purely equitable grounds and will not be enforced against superior equities.' (Peoples vs. Peoples Bros. 354 Fed. 489)

'To entitle a person to subrogation, his equity must be strong and his case clear. * * * Nor will subrogation be enforced where the equities are equal or the rights not clear, * * * nor to the prejudice of the legal or equitable rights of others.' (Story's Equity Jurisprudence, 14th ed., Vol 2, Sec. 707, p. 111)

'The doctrine of subrogation does not apply every time when a surety has discharged a debt which another ought to pay, for after all equity requires that one should do what in good conscience he ought to do, and having done this it affords him no right to inflict a needless hardship upon the rights of others.' (Story's Equity Jurisprudence, 14th ed. Vol 2, Sec. 708, p, 111).

Subrogation is a doctrine of equity and is founded on principles of natural justice. It will not be allowed to the injury of the rights of others, as its object is to place a charge where it ought to rest."

On pages 43 and 44 thereof, as follows:

"It is well established that subrogation must be enforced with a due regard to the legal and equitable rights of others and cannot be used to overthrow a legal right, or a superior or equal equity. To entitle a party to subrogation, his equity must be strong and his case clear and no order of subrogation will be made in a doubtful case.

'Equity violates no law, and it does not assume to make a contract for the parties; it follows the law and upholds it, and when it comes to the relief of one to whom the law cannot afford an adequate remedy, it will not, in so doing, infringe the law or impair its force, nor will it reconstruct the contract between the parties.'

25 R. C. L. 1321

Equity will not permit the American Surety Company to obtain a right to dividends to be paid by said Receiver of said Bank superior to the legal and equitable rights of this appellant. The American Surety Company has a plain remedy at law against its principal, E. J. Groesbeck, and the remedy of this appellant is against its principal, the National City Bank.

'Subrogation is the creature of equity and it will not be permitted where it will work injustice to those having equal or superior equities, or where it will operate to defeat a legal right.'

25 R. C. L. 1312

On pages 44 and 45 thereof, as follows:

"In the trial court, counsel for the American Surety Company cited 23 R. C. L. 1318 and the note appearing in Ann. Cas. 1917 C. at page 1184, and will no doubt cite these authorities to this court, to the effect that a surety is not entitled to be subrogated to the creditor's securities until the claim of the creditor against the debtor, to secure which the securities were given, has been paid in full.

Applying this principle to this case, it simply means that until Salt Lake County had first been made whole by payment to it in full of the amount of its deposit, that none of the surety companies had any right to subrogation. However, counsel for American Surety Company would construe this to mean that until Mr. Groesbeck is indemnified that the National Surety Company cannot participate in the dividends, but such is not the proper application of this rule. * * *

168 However, in the case at bar, Salt Lake County has been made whole and there is now no necessity for invoking the rule established by the authorities last cited above. But counsel for American Surety Company say that Mr. Groesbeck is the creditor who much be made whole, and not the County and until he is first relieved of any claim that his surety, the American Surety Company, may have against him because of its loss, resulting from his failure to comply with the law, that this appellant has no claim on dividends accruing in the hands of the Receiver. But the County and not Mr. Groesbeck is the creditor in this instance and it has been made whole. In no case cited by counsel for American Surety Company was the Treasurer or other custodian of the public funds held to be the creditor rather than the public body he represented."

On page 47 thereof, as follows:

"The only case that we have been able to find determining the rights of the surety executing a depository bond as against those of a surety company executing the official bond, in the case of Cole vs. Myers, American Surety Company and National Fidelity & Casualty Company, reported in 160 N. W. at page 894."

On page 50 thereof, as follows:

"While the statute of Utah does not say that the Treasurer shall not have on deposit at any time more than the maximum amount of the depository bond, yet it in effect says the same thing when it requires that the Treasurer shall take collateral or depository bonds in an amount sufficient to fully protect the public funds. Therefore, the Treasurer, Groesbeck, having failed to take protection in an amount sufficient to proect the funds, the amount of his deposit in excess of such protection, was an illegal deposit. Just as in the case of Cole vs. Myers, this appellant had the right to assume that the Treasurer would comply with the Statute and fully protect the funds. And just as in that case, this appellant's liability and the debt protected by its bond was limited to the amount thereof, and when this appellant paid the amount thereof it not only discharged its legal liability but also discharged the entire debt to secure which its bond was given. Here, too, a construction of Section 4500, Compiled Laws of Utah, 1917, and the other statutes relating to the duties of the Treasurer, will admit of no other conclusion. Had Treasurer Groesbeck complied with the law, he would have incurred no personal liability, nor would his surety have suffered a loss, and the only just conclusion that can be reached here is that neither the Treasurer nor his surety will be permitted to make use of this wrongful act to establish a right to dividends superior to that of this appellant."

And on pages 50 and 51 thereof, as follows:

"The depository bonds given by the surety companies pursuant to Section 4500, were not given for the protection of the Treasurer nor his official surety, as the American Surety Company now contends. Particularly such is the case when the Treasurer fails to protect himself and his surety by not complying with the terms of Section 4500. As pointed out in the case of Cole vs. Myers, the purpose of such a statute is to protect the public funds. We have been unable to find and do not believe that counsel for the American Surety Company can find a single case where a depository surety was held to be an insurer of the Treasurer against loss to himself

personally, or a single case where the depository surety company has been excluded from dividends to the benefit of the surety on the official bond."

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169 Plaintiff National Surety Company designated and offered in evidence that part of Exhibit 16, same being the brief of the American Surety Company on appeal to the Circuit Court of Appeals in the case of National Surety Company appellant vs. Salt Lake County, et al., No. 6819, and the same was received in evidence, as follows:

On pages 2 and 3 thereof, as follows:

"By virtue of assignments from Salt Lake County and E. J. Groesbeck, and likewise by virtue of general equitable principles, the American Surety Company of New York now asked to be subrogated to their rights to all future dividends paid on E. J. Groesbeck's deposit until either through them or by the application of other collateral it has been made whole. * * *

While Salt Lake County, the obligee of the American Surety Company has been made whole, E. J. Groesbeck, the obligee of the National Surety Company, has not. The bank has not yet paid him fifty per cent of his deposit and he is still obligated to the America Surety Company of New York for the full amount it has paid out. Notwithstanding this situation, the National Surety Company now claims right of subrogation as to future dividends on E. J. Groesbeck's deposit and as to the Crystal Lake bonds, prior to the American Surety Company of New York, the assignee of E. J. Groesbeck and Salt Lake County, and in this case the National Surety Company is appealing from a decree of the District Court, holding that it was not entitled to such rights until its obligee, E. J. Groesbeck had been made whole.

The primary questions in this case are, therefore:

First. Now that Salt Lake County has been paid in full, which Surety Company is entitled to priority as to dividends from the receiver, on E. J. Groesbeck's unpaid deposit, as County Treasurer, with the bank?

Second. What are the rights of the two Surety Companies with respect to the $360,000.00 par value Crystal Lake bonds taken by E. J. Groesbeck as aforesaid and subsequently assigned to the American Surety Company of New York?"

On pages 8 to 10 thereof, as follows:

"Appellants' counsel reminds us that as an additional contractual fact the National Surety Company had an agreement for indemnity with the National City Bank (Appellants' Brief 18 to 23 and Tr. 87). We deem this agreement wholly immaterial to the issues of this case, but we refer to it here to get before the court all the alleged contractual relationships of the parties.

Contentions of the National Surety Company

As we understand them, the contentions of the National Surety Company are substantially as follows:

I.

That the indemnity agreement of the bank, embodied in the bank's application to the National Surety Company for depository bond, gives the National Surety Company a direct legal right, not to indemnity out of the general assets of the bank as such, but to indemnity out of the dividends declared and payable upon the claim of Mr. Groesbeck (Appellant's Brief 18 to 23). * * *

Argument.

I.

We shall examine and consider the contentions of the National seriatim.

The contention that the National has a legal right, through the Bank's promise of indemnity, to take its indemnity out of the dividends payable on the Treasurer's claim, is another way of saying that the National by contract with the Bank, to which the Treasurer was not a party, acquired a right against the Treasurer to take or share in his dividends."

On page 11 thereof, as follows:

"It is very clear from the foregoing case, and clear upon principle, that the indemnity agreement between the
170 Bank and the National must be treated as a separate contractual arrangement affecting only the National and the Bank. Whether it constitutes a sufficient basis for some direct claim against the Bank, is interestingly discussed by the dissenting opinion in the foregoing case of U. S. F. & G. Co. vs. Carnegie Trust Company. * * * Surely the National cannot because it has an agreement with the Bank for indemnity, push the Treasurer aside before he has been paid in full upon his approved claim, and step in and receive divi-

dends on that claim, either to his exclusion or pro tanto. Certainly a surety of the Bank cannot by virtue of an indemnity agreement with the Bank alone, be entitled to share ahead of a depositor or a depositor's assignee and subrogee."

On pages 12 of said brief of American Surety Company, Exhibit 16, as follows:

"We submit that both upon principle, as a plain matter of contract, and upon the authority of the case above mentioned, there is nothing in the National's so-called indemnity agreement with the Bank that gives it any standing or any rights in the present litigation."

On page 15 of said brief of American Surety Company, Exhibit 16, as follows:

"When the Treasurer, or when the American as subrogated to and as assignee of his rights, is made whole, then the National is entitled to subrogation as against the Bank; that is to say after the Bank pays the claim of its depositor, the Treasurer, in full, the National is then entitled to be subrogated to the Treasurer's rights against the Bank, but not until then."

On page 19 of said brief of American Surety Company, Exhibit 16, as follows:

"It follows, therefore, that the National, neither through its creditor, the Treasurer, nor through its principal, the Bank, has acquired any rights and that under neither rule is it entitled to subrogation. The National is claiming rights of subrogation under facts and circumstances where no such rights can arise. * * *

If, therefore, the appellant is to be allowed any rights of subrogation in this case, it cannot be under the general principles of subrogation which have heretofore been laid down by this court and other courts, but must be under some exception of those general rules."

On page 22 of said brief of American Surety Company, Exhibit 16, as follows:

"As already stated, the reasoning in Ex Parte Rushforth has been severely criticised particularly in the case of Knafft vs. Knoxville Banking & Trust Company, 182 S. W. 232, but even if this court should approve the exception laid down in

Ex parte Rushforth it is submitted that the National has not brought itself within that exception, that the entire debt protected by its suretyship has not been paid to its creditor, Groesbeck, and that the National is, therefore, without any right of subrogation, either under the well established general rules of equitable subrogation or under the doubtful exception of Ex parte Rushforth."

On page 23 of said brief of American Surety Company, Exhibit 16, as follows:

"We submit that, under the foregoing state of facts, which we believe is an accurate statement of the facts of the instant case, the lower court was right in refusing the National subrogation while the debt of its principal to its obligee remained unpaid and while its obligee stood damaged to the extent of $223,362.15. The National, having no contract with its obligee for conventional subrogation, is in a court of equity setting up a claim to subrogation to the detriment of its obligee."

On page 25 of said brief of American Surety Company, Exhibit 16, as follows:

171 "It is true that the National originally took the position that when it paid the penalty of its bond, in the sum of $125,000.00, it was then entitled to immediate subrogation and entitled to share in future dividends with Groesbeck and the County. However, the National later recognized that its position was untenable, receded from it, and acquiesced in further payments to the Treasurer and the County until the County had been paid in full."

On page 46 of said brief of American Surety Company, Exhibit 16, as follows:

"It is submitted that the natural equities of the case are all with the Treasurer and that as a matter of good conscience the National should not be allowed any rights of subrogation until the Treasurer or his assignee, The American, has received dividends sufficient to fully protect the Treasurer against the liability which he will otherwise sustain on account of interest."

On pages 47 and 48 of said brief of American Surety Company, Exhibit 16, as follows:

"In final summary and conclusion, the appellees call to the attention of the Court the following points:

First: That the contractual relations existing in this case are clear and definite as between the parties involved; that the American had privity with the Treasurer and the County, the American being surety of the Treasurer, as principal, for the County as creditor; that the National had privity with the Bank and the Treasurer, the National being the surety with the Bank as principal, for the Treasurer as creditor; that the National had no privity with the County; that the Treasurer owed the County the amount of public funds deposited by him in the Bank, his debt to the County being secured by the American; that the Bank owed the Treasurer the amount of his deposit therein, that debt from the Bank to the Treasurer being secured by the National, by the Crystal Lake Farm bonds and by other depository security; that the attempt of the National to disturb this contractual situation was abortive and that that situation remains standing, except that by virtue of the assignments of the County and the Treasurer to the American, the latter stands, not merely by subrogation but also by definite contract, in their shoes; that neither the Treasurer nor the County were in any manner parties to the indemnity agreement between the National and the Bank."

Plaintiff National Surety Company designated and offered in evidence that part of Exhibit 9, same being the reply brief of appellant National Surety Company on appeal to the Circuit Court of Appeals in the case of National Surety Company appellant vs. Salt Lake County, et al., No. 6819, and the same was received in evidence, as follows:

On pages 3 to 8 of said reply brief of National Surety Company, Exhibit 9, as follows:

172 "In order to sustain the decree of the trial court, the American is obliged to contend: 1. That this deposit was the Treasurer's and not the County's. 2. That the County has no interest whatever in this deposit of public funds. 3. That the only relation between him and the County was that of debtor and creditor. 4. That the County has no interest whatever in the security taken by him pursuant to Section 4500, for the protection of the public funds, and that the depository bonds given pursuant to said Section are solely for his personal benefit. 5. That the only recourse of the County for the loss of its funds, occasioned by the failure of the Bank, is to look to the official bond of the Treasurer for settlement.

The questions to be determined foremost in this case, are: A. Was the deposit in question the property of the County, as contended by the National, or the property of the Treasurer, as contended by the American, and what is the relation between the County and the Treasurer and the Bank relative to said deposit? B. For what purpose and for whose benefit was the bond of the appellant National Surety Company given? Was it given for the protection of the public funds or was it given to the Treasurer for his sole benefit, as an insurance policy to protect him against loss?

Contractual Relationship of the Parties.

A. Was the deposit in question the property of the County or the Treasurer? * * * *

It is therefore manifest from the facts, the manner in which this account with the National City Bank was kept and treated by the County, its Treasurer and the Bank itself, and in fact by all parties concerned, independent of the legal authorities upon the question, that the title and ownership of this deposit was in Salt Lake County.

B. For what purpose was the bond of the National given?

The American contends that because the name of the obligee expressed in the bond of the National is 'Edward J. Groesbeck, Treasurer of Salt Lake County, Utah,' that the bond of necessity must run to him personally, notwithstanding the provisions of Section 4500, and is his individual property. * * * *

The bond of the National was designed for the protection of public funds. If the Treasurer desired a bond to protect himself against loss on account of the failure of the depository or because of fire, hold-up or robbery, or any of the contingencies by which he might have lost the public funds without his personal fault, he should have secured an insurance policy to that end,"

On page 10 of said reply brief of National Surety Company, Exhibit 9, as follows:

"The purpose of depository laws is to provide a safe place for the keeping of the public funds and at the same time to enable the public to receive compensation for the use of its funds. Statutory provisions relating to depositories should be read in connection with the bond.

In this case the National Surety Company had the right to rely on the Treasurer's keeping the amount of the deposit

within the amount of protection taken by him. (Fremont County vs. Fremont County Bank, 115 N. W., 925.)"

On pages 12 to 31 of said reply brief of National Surety Company, Exhibit 9, as follows:

"II

Under subdivision two of its brief, the American treats of the question as to who was the depositor, but at no
173 point in their discussion of this subject do they demonstrate that Groesbeck was the creditor rather than the County, but throughout their argument upon this point, simply assume that Groesbeck was the creditor. * * * *

So, after all is said and done, this case is really a contest between the National, which the American has called in its brief a 'hired surety' (page 46) and the American, which out of courtesy we will call a 'Compensated' surety.

III.

The American Surety attempts to distinguish the case of Cole vs. Myers, 160 N. W. 894, cited by appellants, from this case, and says that the Nebraska Court in that case held that by making an over deposit contrary to the letter of the law, the Treasurer incurred a personal liability to the County 'which otherwise would have had no existence.' * * * * After all, this case is a contest between the American and the National Surety Company, and the loss of the American Surety Company is directly traceable to the failure of its principal to comply with Section 4500, which it guaranteed that he would do. * * * *

IV.

The American complains that throughout the brief of the National it has treated the Crystal Lake Farm Land bonds in all respects like the dividends. We say they are to be treated in all respects just as the dividends were treated, because the depository bonds and the Crystal Lake Farm Land bonds were given for the same purpose, to-wit, to protect the public funds. * * * *

V.

The American has construed what we said in our original brief with respect to the assignment taken by it from the County and the Treasurer to the effect that such an assignment could not in any way affect the rights of the National

to subrogation from Salt Lake County already acquired by its payment to the County of the sum of $125,000, as an attack upon the assignment. * * * *

The trial court ignored any right that the American may have obtained by assignment, and based its decree in favor of the American entirely upon the theory of subrogation. (Tr. 47). However, counsel for the American Surety Company prevailed upon the trial court to hold that the Treasurer and not the County was the depositor and creditor of the bank, as is shown by the fact that the court awards to the American 'all the dividends payable on the claim in the sum of $568,094.29 of Edward J. Groesbeck, as Treasurer of Salt Lake County,' and also decree that the American is entitled to be subrogated 'to the rights of said Edward J. Groesbeck and of Salt Lake County in the bonds of the Crystal Lake Farm Lands Company of the par value of $360,000 held by said Edward J. Groesbeck as collateral security for the deposit of said moneys.' In other words, the trial court arrived at the conclusion that the collateral and depository bonds given by the bank were for the personal benefit and protection of the Treasurer rather than for the protection of the public funds, and that he rather than the County was the depositor and creditor of the bank, and that the relation between the Treasurer and the County was that of debtor and creditor. It is apparent that the Trial Court agreed with these same contentions that are also made in this court by the American Surety Company. * * * *

VI.

In reply to our complaint that the trial court should not have allowed the American interest in the sum of $23,362.13 accruing on said sum of $200,000 up to February 29, 1924, together with additional interest at the rate of eight per cent per annum from said 29th day of February, 1924, counsel for the American Surety Company say: 'If the American had paid the $200,000 on demand, the $23,362.13 interest would then have accrued in favor of the American as against Groesbeck.' * * * *

The whole argument of the American Surety Company with respect to its right to interest is based upon the theory that the Treasurer and not the County was the depositor, and its theory seems to be that neither the Treasurer nor the American should in any manner be liable for the Treasurer's

failure to protect the public funds. It says that to
174 withhold payment from the American 'would be to prefer the hired surety of a failing bank at the expense of its depositor.' In answer to this statement, we say that in the first place the Treasurer was not the depositor, but the County, and it has been repaid in full; in the second place, if it should be held that the Treasurer was the depositor, his liability to his surety, the American, has been settled; and in the third place, it is manifest that this action is a contest between two hired sureties; and in the fourth place, it is only these hired sureties that have suffered any loss. Throughout this entire case it is apparent that this hired surety, the American Surety Company, has been attempting to lift itself with the bootstraps of the Treasurer although he no longer has any interest in this litigation and cannot be affected thereby."

On pages 33 to 35 of said reply brief of National Surety Company, Exhibit 9, as follows:

"In conclusion, the appellants respectfully submit that it has been established:

1. That the County and not the Treasurer was the depositor in the said National City Bank.

2. That the credtor of the Bank was the County.

3. That the depository bonds and collateral security given by the Bank, were for the protection of the public funds and did not operate as indemnity to the Treasurer, to save him and his surety against loss.

4. That by its payment to the penalty of its bond in the sum of $125,000.00 to Salt Lake County, the National Surety Company became subrogated to the rights of Salt Lake County against said Bank, and that its right of subrogation from Salt Lake County, together with its legal rights arising from the indemnity agreement executed by the said Bank, are superior to any rights of the American Surety Company, and that the National Surety Company is entitled to be repaid in full before the surety of the Treasurer, whose failure to protect the public funds was the proximate and direct cause of the loss to his surety. That because of the failure of said Groesbeck to take, and because of the failure of the American Surety Company to require him to take, sufficient depository protection, and because of the liability assumed by the American Surety Company by reason of the execution of its bond wherein it guaranteed that the Treasurer would comply

with Section 4500, it suffered a loss, from which it now seeks to reimburse itself at the expense of the National Surety Company; That equity and good conscience will not permit the said American Surety Company to make use of such illegal and wrongful act on the part of its principal to establish a right to dividends to the exclusion of or superior to that of the National Surety Company, as decreed by the trial Court.

5. It is submitted that this action is a contest between the two surety companies, as is shown by the evidence herein and by the decree of the trial court.

6. That the County has no claim as against the Treasurer and that the only claim that can be asserted against him arises in favor of the surety companies, for his failure to perform his duty, and of the two surety companies, this appellant, which is an innocent party, is, in equity, to be preferred to the surety which guaranteed that he would perform his duty. As held in the Cole case, 'by making an over-deposit, contrary to the letter of the law, the Treasurer incurred a personal liability to the County which otherwise would have had no existence.' Neither the Treasurer or his surety will be permitted to make use of this wrongful act to establish a right to dividends superior to that of the bank's surety. The loss of the American is traceable to the illegal conduct of the Treasurer in making deposits in excess of the depository protection taken by him. For this wrongful act on the part of the Treasurer, neither the Bank's surety nor the County is in any wise responsible. If the Treasurer had complied with the law, the debt of the Bank to the County would
175 have been paid in full, and the right of this appellant to subrogation would be unassailable. To deny or postpone subrogation because the Treasurer, for whose wrongful act the Bank's surety was not responsible, makes over deposits in violation to the law would extend the liability of this appellant beyond that created by the contract of suretyship.'

In our opening brief we challenged counsel for the American to find a single case where a depository surety was held to be an insurer of the Treasurer against loss to himself personally, or a single case where the depository surety company has been excluded from dividends to the benefit of the surety on the official bond. No such case has been cited by the American.

In conclusion, it is therefore most respectfully submitted that the decree of the trial court should be reversed and a decree entered in favor of the appellants, as prayed for.

ARTHUR E. MORETON
Attorney for Appellants, National Surety Company and American Indemnity Company."

Plaintiff National Surety Company designated and offered in evidence that part of Exhibit 18, same being Petition for Rehearing of National Surety Company in the Circuit Court of Appeals in the case of National Surety Company appellant vs. Salt Lake County, et al., No. 6819, and the same was received in evidence, as follows:

On pages 1 to 3 of said Petition for Rehearing, as follows:

"United States Circuit Court of Appeals Eighth Circuit

December Term 1924.

National Surety Company, a Corporation, Appellant,
No. 6819 vs.
Salt Lake County, A Subdivision of the State of Utah, et al.,
Appellees.

Appeal from the District Court of the United States for the District of Utah.

Petition for Rehearing.

Now comes the National Surety Company and the Americant Indemnity Company, the appellants in the above-entitled cause, and each of them, and move the court for a rehearing herein and for the following reasons; that is to say:

I.

The Court erred in holding and determining that the Treasurer of Salt Lake County is merely the debtor of the County, rather than its agent with respect to the deposit made by him of the public funds of said
176 County in the National City Bank, in the sum of $643,-094.29, and that the National City Bank is in turn the debtor of the Treasurer rather than of Salt Lake County in the same amount.

II.

The court erred in holding and determining that the depository bond given by the appellant National Surety Com-

pany was given for the personal benefit of the Treasurer rather than for the protection of the public funds and that in effect Salt Lake County had no interest in the depository bonds given by the appellant National Surety Company and other companies, as well as the collateral given by the said Bank, conditioned for the safekeeping of the public funds of said County.

III.

The court erred in holding and determining that the Treasurer was not negligent in taking from the National City Bank the Crystal Lake Farms Company bonds of the par value of $360,000.00 as collateral security for the deposit of the public funds of Salt Lake County in said Bank.

IV.

The court erred in holding and determining that there was fraud on the part of the said National City Bank with respect to representations as to the value of the bonds of the Crystal Lake Farms Company, and that the negligence of the Treasurer was induced by the fraud of the National City Bank.

V.

The court erred in affirming the decree herein with reference to the allowance of interest to the American Surety Company on the sum of $200,000.00.

VI.

The court erred in affirming the decree herein holding that the American Surety Company is entitled to be first paid in full from the dividends paid and to be paid by the Receiver of the National City Bank before these appellants receive anything.

VII.

The court erred in not holding and decreeing that the American Surety Company and the appellant National Surety Company were sureties for the same debt and that their rights were at least equal and that dividends upon the deposit of Salt Lake County in said National City Bank and proceeds from the Crystal Lake bonds be shared by them pro rata.

Respectfully submitted,

ARTHUR E. MORETON,
Attorney for Appellants National Surety Company and American Indemnity Company."

On pages 4 to 6 of said Petition for Rehearing, Exhibit 18, as follows:

"Suggestions in Support of Petition for Rehearing.

It is our hope to avoid extending this presentation beyond reasonable bounds, and also to avoid repetition and re-threshing of old straw so far as possible.

I.

The decision of this honorable court hinged primarily, and necessarily so, on the finding as to who is the creditor of the National City Bank with respect to this deposit of $643,094.29 of the funds of Salt Lake County, and secondarily, on the finding as to the purpose for which the bond of the appellant National Surety Company was given. The finding as to who is the creditor of the Bank to a large extent, determines for what purpose and for whose benefit appellants bond was given.

The decision of this court to the effect that the Treasurer is merely the debtor of the County and the Bank is the
177 debtor of the Treasurer, rather than the County, is a matter of great public interest and of great concern generally to all governmental bodies. This court, in our opinion, should hesitate before establishing such a doctrine, for it will, indeed, lead to pernicious practices, if we may be pardoned for so stating, and it is a doctrine that will be fraught with many difficulties, as well as disastrous results.

The finding that the National City Bank was the debtor of the Treasurer rather than the County is a mixed question of law and fact. We respectfully urge that the Opinion herein is contrary to law and fact. We think that the facts in this case show conclusively and indisputably that the County and not the Treasurer was the creditor of the Bank, for the following reasons:

1. The deposit was carried in the Bank in the name of Salt Lake County, Utah, as is shown by the statements of the Bank to the County. (Exhibits 4 and 5, Tr. 65-67). This proves that the title and ownership of the money was in Salt Lake County and not in the Treasurer.

2. In order to draw against this deposit, the Treasurer was obliged to have the counter-signature of the County Auditor, as shown by the checks drawn against this deposit. (Exhibits 6 and 7, Tr. 68; Exhibit 8, Tr. 69-70). It thus clearly appears that the deposit was treated by the Bank, by Salt

Lake County and by its Treasurer as that of Salt Lake County.

3. The Treasurer is expressly forbidden by Section 8235, Compiled Laws of Utah, 1917 (the full text of which is set forth in our original brief, at page 24) from paying out any portion thereof for any purpose, unless authorized by law.

It therefore appears conclusively to us that at all times the money deposited with said Bank was and is the property of Salt Lake County and that the Bank and later its Receiver, treated and considered the deposit as that of Salt Lake County, that the relationship of debtor and creditor does not exist between the Treasurer and the County, but does exist between the Bank and the County.

Apparently none of the above matters, which we think are controlling in this case, were considered by this honorable court, at least they were not commented on in the Opinion of this court.

The decision of this court, in effect holds, and if permitted to stand will, unfortunately, be hereafter quoted as an authority for the following propositions:

1. That the relationship between the County and its Treasurer is that of creditor and debtor.

2. That the State, County or any other political subdivision thereof, has no interest whatever in the deposit of their public funds once they have been deposited in the Bank by the Treasurer.

3. That the State, County or other political subdivision has no interest in the security taken by its Treasurer pursuant to Section 4500 Compiled Laws of Utah, 1917, for the protection of the public funds.

4. That depository bonds given pursuant to said Section 4500 are for the protection of the Treasurer rather than the public funds.

5. That the only recourse of the County for the loss of its funds, occasioned by the failure of a bank, is to look to the official bond of the Treasurer for settlement."

On pages 32 to 35 of said Petition for Rehearing, Exhibit 18, as follows:

"May we, in conclusion, suggest that, in our opinion, this honorable court erred in the following respects:

I.

That it considered the official bond written by the American Surety Company in behalf of the Treasurer as a mere 'fidelity bond,' and it is denominated as such and nothing more in the opinion of this court. We respectfully urge that in our opinion the bond of the American Surety Company is in effect an indemnity bond, as held by the Utah Su-
178 preme Court in the case of Salt Lake County vs. American Surety Company, 222 Pac. 600. This bond provides that the Treasurer 'shall well and truly account for and pay over all moneys coming into his hands and shall well, truly and faithfully perform all duties required of him by law,' and among which duties was that of requiring from the depository bank sufficient collateral or depository bonds to fully protect the public funds. In other words, the obligation of the American Surety Company is co-extensive with that of its principal, the Treasurer, and its liability under its bond, therefore, was something very much more than that of a surety on a mere fidelity bond.

2.

The court, in our opinion, erred in finding that the Treasurer rather than the County is the creditor of the bank, for the reasons following:

A. The deposit was carried in the name of Salt Lake County.

B. In order to draw against the deposit, the Treasurer was obliged to have the counter-signature of the County Auditor.

C. The Treasurer is the mere custodian of the County's funds and the County Auditor is the disbursing officer.

D. The Treasurer is expressly forbidden by the laws of Utah, (Sec. 8235 Comp. Laws of Utah, 1917) from paying out any portion thereof unless authorized by law.

E. The dividends on the deposit were paid to the County.

F. The depository bonds were enforced by and paid to the County.

G. The decisions of the Utah Supreme Court are controlling.

3.

This court, in our opinion, erred in finding that the Treasurer rather than the County was the obligee of the depos-

itory bond executed by this appellant, for the reasons following:

A. The Treasurer was but the nominal obligee, the real obligee being the County and the purpose of the bond being to protect its public funds.

B. The legislature authorized the reduction of the Treasurer's bond from $4,000,000 to $200,000, relying upon the depository bonds for the protection of the public funds, in lieu of the larger official bond theretofore required of the Treasurer.

C. The penalties of the respective depository bonds were enforced and collected by the County itself rather than the treasurer.

4.

This court, in our opinion, erred in arriving at the following conclusions, which we respectfully submit are not based upon the facts or upon law, and which conclusions, erroneously arrived at, of necessity led the court to erroneously affirm the decree.

A. That the bond of the American Surety Company was a mere fidelity bond rather than an indemnity bond.

B. That Groesbeck, Treasurer of Salt Lake County, was the obligee of appellant's bond.

C. That the deposit made the bank the debtor of Groesbeck and that the relation of debtor and creditor was created between the Bank and Groesbeck.

D. That the relation of Debtor and Creditor only existed between the County and Groesbeck. * * * *

We think, upon consideration of the foregoing, the court should entertain the application for rehearing herein.

Wherefore, it is submitted that the Petition for Rehearing in the above entitled cases should be granted.

Respectfully submitted,

ARTHUR E. MORETON
Attorney for Appellants National Surety Company and American Indemnity Company."

179 Plaintiff National Surety Company designated and offered in evidence that part of Exhibit 17, same being Petition for Writ of Certiorari and brief in support thereof of National Surety Company, in the case of National Surety Company appellant v. Salt Lake County, et al., No. 6819, and the same was received in evidence, as follows:

On page 2 of said Petition for Writ of Certiorari, Exhibit 17, as follows:

"Briefly, this action grows out of the failure of the National City Bank of Salt Lake City, Utah, and is a contest as to respective rights to priority in dividends declared and to be declared by Edward E. Jenkins, Receiver of said defunct Bank, upon the deposit of public funds of Salt Lake County in said Bank, made by E. J. Groesbeck, Treasurer of said County and amounting to $643,094.29 at the time of the failure of said bank on January 17, 1922."

On page 8 of said Petition for Writ of Certiorari, Exhibit 17, as follows:

"The Question To Be Determined.

This action resolves itself into a determination of this question: Is the respondent American Surety Company, which executed for said Treasurer Groesbeck his official bond to Salt Lake County in the penal sum of $200,000.00, entitled to priority in the payment of further dividends on said deposit, to the exclusion of and before the petitioner National Surety Company, which furnished Salt Lake County, in behalf of said National City Bank, a depository bond in the penal sum of $125,000.00, receives any reimbursement whatsoever, as decreed by the United States Circuit Court of Appeals for the Eighth Circuit, or is the National Surety Company entitled to priority in the distribution of said dividends ahead of said American Surety Company, or are each of these surety companies entitled to their pro rata share of such dividends, with priority to none?"

Plaintiff National Surety Company designated and offered in evidence that part of Exhibit 19, same being brief of American Surety Company on Petition for Writ of Certiorari, in the case of National Surety Company appellant vs. Salt Lake County, et al., No. 6819, and the same was received in evidence, as follows:

"III.

The Essential Question In The Court Below.

The ultimate question for determination by the court under the situation above set forth was: The County having been paid in full, which one of the two surety companies became entitled to priority as to dividends upon the deposit of Groesbeck, and as to the Crystal Lake Farm Lands Bonds? The National claimed right of subrogation prior to, or at least pro rata with, the American, which, not only by assignment but also, as it asserted, upon the usual eqitable principles of subrogation, was in the shoes of Groesbeck and the County. The National asserted that
180 the County, not Groesbeck as Treasurer, was the depositor and creditor of the Bank; that the National was depository surety to the County, not to Groesbeck, in spite of the fact that the latter, not the County, was the named obligee in its bond (Record 89, 90); and that, the County having been paid in full, the National was subrogated to the County's claim against the Bank and entitled to be reimbursed first, or pro rata, through dividends upon the deposit and through the collateral. To the contrary, the American contended that under the undisputed contractual facts, including the terms of the bond, and under the decision of the Supreme Court of Utah in Salt Lake County vs. American Surety Company of New York, supra, Groesbeck, not the County, was the depositor of the Bank; that the County was the creditor of Groesbeck and his surety, the American, not of the National; that to whatever rights the County had, either against the Bank or Groesbeck, the American, not the National, was subrogee and assignee; and that the American was subrogated to the rights of Groesbeck against the Bank; that the National brought itself within no rule of equitable subrogation, but was left standing upon the case of Cole vs. Myers, 100 Neb. 480, 160 N. W. 894, or the case of Ex parte Rushforth, 10 Ves. Jr. 409," both of which were distinguishable and the latter discredited; and the American relied upon the following cases typifying the settled rule to the effect that subrogation will not be permitted in favor of a surety to the detriment of its obligee. United States vs. National Surety Company, 254 U. S. 74, 65 L. Ed. 143; Knaffl v. Knoxville etc. Company, 133 Tenn. 655, 182 S. W. 232; Ann. Cas. 1917-C, 1182; National Surety Company vs. State Savings Bank, 156 Fed. 21; Note, 9, A. L. R. p. 1596 et seq; 25 Ruling Case Law, Subrogation, p. 1318, Sec. 6. The National contended further

that by negligence and unlawful conduct in making deposits in the Bank pursuant to Section 4500 Compiled Laws of Utah, 1917, Groesbeck, and thereby his surety, the American, forfeited the rights they might otherwise have had to reimbursement ahead of the National as depository surety and the American to the contrary contended that the record failed to show negligence or violation of law under any interpretation of that statute. These points and the ultimate question of subrogation the District Court of the United States and the United States Circuit Court of Appeals, the latter tribunal unanimously, decided in favor of the American, holding the latter entitled to priority to dividends upon the deposit and to priority as to the collateral security, until its payment upon Groesbeck's debt to the County and interest thereon was repaid in full.

IV.

The Grounds Urged For The Writ And Response Thereto."

On page 7 of said reply of American Surety Company to Petition for Writ of Certiorari, Exhibit 19, as follows:

"But the circuit Court of Appeals held, not this, but that the County was not upon all views the creditor of the Bank, as the National insisted, notwithstanding that the money deposited in the Bank was in some aspects there as a trust fund; that in such view as was necessary to determine the rights of subrogation though of course not necessarily upon all views, the Treasurer was the debtor of the County and the Bank the debtor of the Treasurer, not the County."

On page 9 of said reply of American Surety Company to Petition for Writ of Certiorari, Exhibit 19, as follows:

"Instead of having departed from this rule, the Circuit Court of Appeals in the instant case, as indicated in the quotation above from the opinion, itself decides that the Treasurer, in such view as is necessary to determine the question of subrogation, is the debtor of the County and the Bank the debtor of the Treasurer."

181 On page 15 of said reply of American Surety Company to Petition for Writ of Certiorari, Exhibit 19, as follows:

"Cases are numerous holding, under language similar to that in the National's bond, that such a bond stands back of

the entire deposit, not simply such part thereof as is equal to the penalty, and therefore holding that there is no subrogation until the whole debt has been paid."

On page 18 of said reply of American Surety Company to Petition for Writ of Certiorari, Exhibit 19, as follows:

"The case involves merely a private dispute as to subrogation between surety companies."

(At the conclusion of the evidence and of the argument, the Court said:)

The Court: Gentlemen, I gave this case considerable thought last night after the argument and I hardly think it worth while to take your time to argue it further or to file briefs.

It seems to me clear, notwithstanding the theory relied upon by the plaintiff in this action to distinguish it from the former case, that the subject matter of the litigation is the same and that the former case has disposed of the subject matter definitely and that nothing is left to be disposed of in this case otherwise than therein determined.

In that case the Circuit Court of Appeals affirmed the judgment of this court giving priority of payment to the American Surety Company of the amount due it through Mr. Groesbeck before the plaintiff in this case can be paid anything.

Now you cannot change that decree by changing the theory of your cause of action. The subject matter of this litigation has been disposed of.

Without doubt by the payment of the $125,000, the penalty of its bond, the bank became indebted to the plaintiff, and it is a just debt and should be paid, but it cannot be paid at the expense of other claimants upon the funds
182 of the bank, and this court cannot decree such payment, even if it believed plaintiff entitled to such a decree, in face of the disposition which has been made of these funds by the decision of this court and by the opinion of the Circuit Court of Appeals.

It is hardly necessary, it seems to me, now to discuss the merits of this case. They were gone into thoroughly in the former case. The outcome of plaintiff's theory in this case and in the former case would be that while it would pay in

the first instance $125,000 the penalty of its bond, with one hand, it would hold out its hand to the Receiver to get back $93,750.00, and as a matter of fact, when you work it out, it would only have actually contributed $31,250.00 to make up this deficiency. But however we may discuss it, assuming that sore of result could be accomplished rightfully under the facts in the case, how can this court at this time and in this suit authorize such payment? As already said, by the decree in the former suit no funds are available for the liquidation of the plaintiff's indebtedness until Mr. Groesbeck as treasurer, or his guarantor, the American Surety Company, has been made whole. That judgment must stand.

I think a proper decree in this case will be one declaring plaintiff's claim to be a valid claim against the bank and allowing it as a claim against the bank. The Receiver should be directed and authorized to pay it out of the funds coming into his hands from the assets of the bank, with this proviso, that the American Surety Company shall be paid as decreed in the former case. If there was any overplus due Mr. Groesbeck after the payment of the American Surety Company in making it whole, then there should be a further proviso that plaintiff shall not be paid until Mr. Groesbeck has been made whole, but as I understand it, Mr. Groesbeck will have nothing coming to him after the American Surety Company has been fully reimbursed.

Now it may happen that these Crystal Lake Bonds may be worth something in the future. If that should occur and there should be enough to reimburse the treasurer in full and leave something over, the plaintiff might then have the right to be paid along with other creditors. But in that event other creditors may object and put in issue
183 plaintiff's right to even then participate. That question I am not deciding at present. I am deciding this case only in respect to the parties who are now before the court.

I cannot see, however valid your argument might be on the merits, how this court can escape the conclusion that this whole matter has been litigated and stands res judicata in this court at this time. Therefore, as I stated awhile ago, it seems to be utterly useless that I should read your authorities.

Gentlemen, you may prepare a decree along the lines suggested by the Court.

It seems proper that I should now make up the record for you.

Plaintiff's claim as such is not really denied by the answers in the case. It is admitted that you paid the amount alleged, and that being admitted, it follows that your claim is an allowable claim to be paid under conditions out of the assets of the bank. It should be paid by the Receiver if any funds are ever available. Defendants set up as a defense that this matter is res judicata and that plaintiff, as the result of the situation of the parties, is not entitled to share in the funds. It seems to me these are equitable matters properly triable in a court of equity and I shall so treat it and order it tried upon the equity side of the court, and plaintiff may have an exception.

If my view is correct, without motions or special findings one way or the other, plaintiff will be entitled to a review of the facts. If counsel feel the Circuit Court might regard it as a law action, notwithstanding, you may make a record by moving the court for a judgment in your favor, and that would raise the question.

Mr. Moreton: I take it the record is sufficiently protected to review the facts by your Honor's ruling directing it to be transferred to the equity side.

The Court: I think the Circuit Court will consider it from the equity side, although I may be mistaken.

Mr. Moreton: If it should not, perhaps I better make the motion your Honor suggents. I will make such a motion as your Honor has suggested.

184 The Court: You move the court for a judgment in your favor?

Mr. Moreton: Yes, your Honor.

The Court: That motion will be denied and you may have your exception. And your motions to strike will be denied.

Now, were there any other matters? Does that clear the record?

Mr. Moreton: I believe it does.

Mr. Ray: I think it does.

Mr. Jensen: I think it does.

The Court: You may have an exception to the order of the court denying your motions to strike.

Mr. Moreton: Yes, your Honor.

Filed in United States District Court, District of Utah, Mar. 25, 1926. John W. Christy, Clerk, By W. B. Wilson, Deputy.

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185 Stipulation Approving Condensed Statement of Evidence.

It Is Hereby Stipulated And Agreed, by and between the parties to the above entitled action, acting through their respective solicitors, that the foregoing condensed statement of the evidence taken at the trial of the said cause, as prepared by the plaintiff, National Surety Company herein, is in all respects true, complete and properly prepared and contains a correct condensed statement of all the evidence, both oral and documentary, given in said cause, and that the same may be settled, allowed, approved and signed by the Judge of the above entitled Court, and that when so approved and signed it shall be filed with the Clerk of said Court and shall become part of the record on appeal in said action.

A. E. MORETON,
Attorney for Plaintiff, National Surety Company.

BAGLEY, JUDD & RAY
Attorneys for Defendant Edward E. Jenkins, Receiver of National City Bank.

CHENEY, JENSEN, MARTINEAU & STEPHENS
Attorneys for Defendants American Surety Company and E. J. Groesbeck.

Dated: March 24th, 1926.

Filed in United States District Court, District of Utah, Mar. 25, 1926, John W. Christy, Clerk, By W. B. Wilson, Deputy.

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186 Order Settling Condensed Statement of Evidence.

The matter of the settlement of the Condensed Statement of the Evidence in said cause as prepared by the plaintiff National Surety Company, a corporation, and lodged in the office of the Clerk of said Court on March 24th, 1926, coming on regularly to be heard on this 25th day of March, 1926, and it appearing to the Court that each and all of the parties

of this action have filed herein their written sitpulation that the said Condensed Statement of Evidence as prepared by the plaintiff National Surety Company, is in all respects true, complete and properly prepared and contains a correct condensed statement of all the evidence, both oral and documentary, given in said cause, and the Court being fully advised in the premises.

It Is Hereby Ordered that the Condensed Statement of the Evidence in said cause, as prepared by the said plaintiff National Surety Company, and lodged in the office of the Clerk of this Court on March 24th, 1926, be and the same is hereby settled, allowed and approved as the Condensed Statement of the Evidence in said cause of said plaintiff National Surety Company, a corporation, and is hereby made a part of the record on appeal in said action.

Dated this 25 day of March, 1926.

TILLMAN D. JOHNSON,
District Judge.

Filed in United States District Court, District of Utah, Mar. 25, 1926, John W. Christy, Clerk, By W. B. Wilson, Deputy.

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187 Stipulation Waiving Bond on Appeal.

It Is Hereby Stipulated And Agreed, by and between the solicitors for the respective parties to the above entitled action, that a cost-bond on appeal on the part of the appellant herein, to-wit, National Surety Company, a corporation, is hereby expressly waived.

Dated March 24, 1926.

A. E. MORETON
Attorney for Plaintiff
National Surety Company.

BAGLEY, JUDD & RAY
Attorneys for Defendant
Edward E. Jenkins, Receiver of
National City Bank.

CHENEY, JENSEN, MARTINEAU & STEPHENS
Attorneys for Defendants
American Surety Company and
E. J. Groesbeck.

Filed in United States District Court, District of Utah, Mar. 25, 1926. John W. Christy, Clerk, By W. B. Wilson, Deputy.

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188 Petition of National Surety Company For Appeal.

To the Honorable Tillman D. Johnson, United States District Judge for the District of Utah:

The above named plaintiff, National Surety Company, feeling itself aggrieved by the decree made and entered in this cause on the 31st day of December, 1925, does hereby appeal from said decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and it prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings, and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Paul, Minnesota.

And your petitioner further prays that the proper order touching the security to be required of it to protect its appeal be made.

Dated March 26, 1926.

A. E. MORETON,
Attorney for Plaintiff National Surety Company.

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189 Received copy of the foregoing Petition on Appeal and due service thereof acknowleged this 26 day of March, 1926.

BAGLEY, JUDD & RAY,
Attorneys for Defendant Edward E. Jenkins, Receiver of National City Bank.

CHENEY, JENSEN, MARTINEAU & STEPHENS
Attorneys for Defendants American Surety Company and E. J. Groesbeck.

Filed in United States District Court District of Utah Mar. 26, 1926, John W. Christy, Clerk. By W. B. Wilson, Deputy.

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190 Order Allowing Appeal.

Pursuant to the stipulation of the parties herein, It Is Hereby Ordered that a cost-bond on appeal on the part of the appellant National Surety Company, a corporation, is hereby expressly waived, and the appeal of said appellant is hereby allowed this 26 day of March, 1926.

TILLMAN D. JOHNSON
United States District Judge.

Filed in United States District Court District of Utah Mar. 26, 1926, John W. Christy, Clerk, By W. B. Wilson, Deputy.

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191 Assignments of Error.

(Filed in U. S. District Court on March 26, 1926.)

Comes now the National Surety Company, a corporation, the plaintiff above named, and says that the decree entered in the above entitled cause on the 31st day of December, 1925, is erroneous and unjust to the above plaintiff, and assigns the following errors upon which it will rely for a reversal of said decree, to-wit:

1. That the Court erred in its decree herein in fixing any limitations, qualifications or conditions upon the allowance of plaintiff's claim herein sued upon, and should have allowed the same without qualification or limitations thereon; for the reason that the claim herein sued upon is a valid and outstanding obligation of the National City Bank, created by express contract with the said bank, and therefore it should have been ordered and decreed by the Court, not only that said claim should be allowed and approved, but that the defendant receiver should be directed to pay to the plaintiff dividends thereon upon the same basis as paid to other common creditors of the said bank, for the reason that the undisputed evidence herein shows that on the 3rd day of

192 January, 1921, the plaintiff National Surety Company, upon the request and application of the National City Bank, executed and delivered to Edward J. Groesbeck as County Treasurer of Salt Lake County, its certain bond in the sum of $125,000.00; that as the inducement and consideration for the execution of said bond, the National City Bank made, executed and delivered to the plaintiff National Surety Company its certain Indemnity Agreement, of date December 22, 1920, wherein and whereby it agreed to indemnify the plaintiff National Surety Company and save it harmless

from all claims or demands whatsoever on account of its execution of the said bond; and in said Indemnity Agreement plaintiff was given the right to look to and rely upon the property of said National City Bank and its income and earnings, and to follow and recover out of the bank's property, for anything that might become due to the plaintiff under said Indemnity Agreement; that the said National City Bank failed and this plaintiff was obliged to and did pay to Salt Lake County and Edward J. Groesbeck, its Treasurer, the sum of $125,000.00 and that by reason thereof the said National City Bank became indebted to the plaintiff in the sum of $125,000.00; and that plaintiff duly filed with said defendant Receiver its claim herein in the sum of $120,000.00. ($5000.00 of its claim having been assigned to the American Indemnity Company); and that therefore the Court should not only have made its order herein allowing and approving said claim, but also its order directing the defendant Receiver to pay to the plaintiff dividends upon said sum of $125,000.00 upon the same basis as paid to other common creditors of said bank.

2. That the Court erred in making its decree herein ordering, adjudging and decreeing: "(a) That the National Surety Company, plaintiff, shall have and recover nothing from the defendant Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City, until and after such time as the said Jenkins, Receiver, shall have paid to the American Surety Company or until the American Surety Company shall have received out of the assets of said bank,
including the proceeds from the $360,000.00 par value
193 of Crystal Lake Farms Company bonds, the sum of
$223,362.15, together with interest at the rate of 8 per cent per annum on the sum of $200,000.00 from the 29th day of February, 1924, all as provided in that certain decree of June 10, 1924, hereinbefore referred to," for the reason that such portion of the said decree is contrary to and against law and no such limitation or qualification upon the payment of plaintiff's claim herein should have been made, and that such qualification or limitation is inconsistent with the allowance and approval of the claim itself and absolutely nullifies that portion of the decree herein allowing and approving as a just and valid claim against said Receiver of said National City Bank, plaintiff's claim herein sued upon.

3. That the Court erred in making its decree herein ordering, adjudging and decreeing: "(b) That the allowance of the National Surety Company's claim herein sued upon, shall

not affect the present basis of computing and paying dividends as now established by the receiver upon claims heretofore approved," for the reason that such portion of the said decree is contrary to and against law and no such limitation or qualification upon the payment of plaintiff's claim herein should have been made, and that such qualification or limitation is inconsistent with the allowance and approval of the claim itself and absolutely nullifies that portion of the decree herein allowing and approving as a just and valid claim against said Receiver of said National City Bank, plaintiff's claim herein sued upon.

4. That the Court erred in making its decree herein ordering, adjudging and decreeing: "(c) That the Receiver shall not set up the claim of the National Surety Company herein sued upon on his books as an approved claim upon which dividends are to be paid, nor shall he set aside any funds or assets for the payment of dividends thereon, nor shall he pay any dividends thereon, and plaintiff's claim to share at this time in dividends upon said claim, is denied," for the reason that such portion of the said decree is contrary to and against law and no such limitation or qualifica-
194 tions upon the payment of plaintiff's claim herein should have been made, and that such qualification or limitation is inconsistent with the allowance and approval of the claim itself and absolutely nullifies that portion of the decree herein allowing and approving as a just and valid claim against said Receiver of said National City Bank, plaintiff's claim herein sued upon.

5. That the Court erred in its decree herein in finding and decreeing "That the subject matter of this action has heretofore been fully determined and adjudicated by decree of this Court made and entered on the 10th day of June, 1924, in case No. 8069, entitled 'Salt Lake County, a subdivision of the State of Utah, E. J. Groesbeck, County Treasurer of said Salt Lake County, and American Surety Company of New York, a corporation, plaintiffs, vs. Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, a national banking association, defendant, National Surety Company of New York, a corporation, American Indemnity Company, a corporation, and Massachusetts Bonding & Insurance Company, a corporation, Interpleaded Defendants,' " for the reason that the undisputed evidence shows; —that said action was one in rem and involved only the respective rights of the American Surety Company and the National Surety Company in and to dividends to be paid by the

defendant Receiver on the said deposit of public moneys, in which action this plaintiff was required by order of the Court to appear and set forth its claim to subrogation to said dividends, and that in said action no issue was joined or tried between this plaintiff National Surety Company and said defendant Receiver upon the right of this plaintiff to have its claim against said Receiver arising out of the Indemnity Agreement herein sued upon, allowed and approved and the Receiver directed to pay dividends thereof; that the undisputed evidence shows that in said action no claim was made or asserted at the trial thereof by this plaintiff for judgment against said Receiver arising out of said Indemnity Agreement, and that said action at the outset thereof resolved itself into and was recognized by all the parties thereto,

as purely a contest between said surety companies as
195 to their respective rights to priority by subrogation in
and to dividends to be paid upon said deposit; that the question here involved of plaintiff's right to recover against the Receiver of said bank directly upon said express contract of indemnity, was not decided nor even mentioned in the decree of the trial court nor in the opinion of the United States Circuit Court of Appeals for the Eighth Circuit, affirming said decree, in said other action, said decision and decree being based entirely upon a consideration of the respective equitable rights of the respective surety companies to succeed by subrogation to the rights of Salt Lake County and E. J. Groesbeck, its Treasurer, in and to the dividend then declared and in the hands of the Receiver upon the said deposit of public funds, and in and to dividends thereafter to be declared by him upon said deposit. That the case at bar is an action at law founded upon the express obligation and contract of the National City Bank, arising out of the written Indemnity Agreement made and executed by said bank to the plaintiff as the inducement and consideration for the execution of plaintiff's bond in behalf of said Bank to E. J. Groesbeck, Treasurer of Salt Lake County, guaranteeing the repayment to him of all moneys deposited by him as such Treasurer in said Bank up to the amount of the penalty of said bond, and the obligation resulting therefrom from said National City Bank to this plaintiff by reason of the failure of said Bank and the payment by the plaintiff to Edward J. Groesbeck as Treasurer of the penalty of said bond in the sum of $125,000.00, claim for which amount plaintiff presented to the defendant Receiver of said Bank and brought the present action to require the said defendant Receiver to allow and approve said claim and to pay to plaintiff dividends thereon, upon the same basis as paid to other creditors of said Bank.

That the Court erred in making said finding for the reason that it failed to distinguish between plaintiff's right to subrogation to the dividends or fund involved in said other action, and plaintiff's rights herein based solely and directly upon its written contract of indemnity with said bank, and the obligation arising out of the same, which right is a distinct,
196 sepaarte and independent matter and cause of action from plaintiff's right to share by subrogation in and to the dividend in controversy in said other action, and which cause of action has never been adjudicated between plaintiff and said defendant Receiver, neither party having had their day in Court thereon.

6. That the Court erred in making its orders, of date October 17, 1925, interpleading the American Surety Company of New York, a corporation, and E. J. Groesbeck, as defendants herein, and in requiring them to "appear in this action and set forth their claims, if any, to the property subject of said action," for the reason that plaintiff seeks herein to recover upon a written Indemnity Agreement executed by the National City Bank as the inducement and consideration to the plaintiff for the execution of a certain depository bond in behalf of said Bank, and in favor of E. J. Groesbeck, as Treasurer of Salt Lake County, Utah, under which bond this plaintiff was obliged to pay the penalty thereof to E. J. Groesbeck as Treasurer of Salt Lake County, and to Salt Lake County, Utah, in the sum of $125,000.00. That plaintiff filed a claim with the defendant Receiver of said bank in said amount on account of said Indemnity Agreement and requested that the same be allowed and approved and that dividends be paid to it upon the same basis as to all other common creditors of said bank; and that therefore the said American Surety Company and the said E. J. Groesbeck had no interest whatsoever in the subject matter of this action and therefore were not proper parties defendant.

7. That the Court erred in denying the Motion of the plaintiff National Surety Company to strike from the answer of the defendant Receiver the following portions of said answer, to-wit: Paragraphs 23, 24 and 25 thereof; for the reason that the matters and things therein set forth were and are immaterial, sham, frivolous and argumentative and do not constitute any defense to plaintiff' cause of action herein sued upon. (Condensed Statement 114).

8. That the Court erred in denying the Motion of the Plaintiff National Surety Company to strike from the Amended

Answer of the defendants American Surety Company
197 and E. J. Groesbeck that portion thereof beginning on
the eleventh line from the bottom of page five thereof with the words: "That the dividends already paid" and ending with the conclusion of said paragraph, for the reason that the matters and things therein set forth were and are immaterial, sham, frivolous and argumentative and do not constitute any defense to plaintiff's cause of action herein sued upon. (Condensed Statement 114).

9. That the Court erred in making its order on December 3rd, 1925, transferring this action from the law side to the equity side of the Court and in treating and considering this action as one in equity rather than as one at law, for the reason that plaintiff seeks herein to recover upon a written Indemnity Agreement executed by the National City Bank as the inducement and consideration to the plaintiff for the execution of a certain depository bond in behalf of said Bank, and in favor of E. J. Groesbeck, as Treasurer of Salt Lake County, Utah, under which bond this plaintiff was obliged to pay the penalty thereof to E. J. Groesbeck as Treasurer of Salt Lake County, and to Salt Lake County, Utah, in the sum of $125,000.00, and that said action is therefore one at law. (Condensed Statement 113).

10. That the Court erred in denying the Motion of the plaintiff National Surety Company herein for a judgment in its favor, the reason that the undisputed evidence herein shows that the plaintiff National Surety Company has a just and valid claim against said Receiver for the sum of $125,000.00, arising out of express contract, which claim the Court not only should have allowed and approved, but also should have directed the defendant Receiver of said Bank to pay to the plaintiff dividends thereon upon the same basis as paid to other common creditors of said bank.

11. That the Court erred in not finding, as pleaded in the Amendment to plaintiff's Reply to the Answer of the defendant Receiver, and as shown by the undisputed evidence herein, that the National City Bank, having accepted the benefit derived from the surety bond furnished by this plaintiff in
198 its behalf, and the said interpleaded defendants American Surety Company and E. J. Groesbeck having received and accepted the benefits derived from the said surety bond so furnished, and the payment thereunder of the sum of $125,000.00, cannot escape from the obligation assumed by said bank in securing said bond, to-wit, to reimburse the plain-

tiff for any loss it might sustain thereunder, and that the said defendants and each of them are, by reason thereof, barred and estopped from asserting and claiming that the claim of the plaintiff herein sued upon, founded upon said obligation, should not be allowed and approved and dividends thereon be paid to it upon the same basis as to other common creditors of the bank.

12. That the Court erred in admitting in evidence, over the objection and exception of plaintiff National Surety Company, the eighth Assignment of Error of the appellant National Surety Company, from Exhibit 3 (Transcript of the Record in said other action), which appears at pages 126 to 128 thereof, for the reason that the same is immaterial, irrelevant and not within the issues of this case, and that the question of res judicata should be determined from the pleadings and the decree in said other action, and that it is unfair to pick out from the eighteen Assignments of Error in said other action, said Eighth Assignment of Error. (Condensed Statement 61).

13. That the Court erred in admitting in evidence, over the objection and exception of plaintiff National Surety Company, those portions of Exhibit 10, same being plaintiff's brief in said other action in the United States Circuit Court of Appeals, shown and designated at pages 63 to 67 of the Condensed Statement of the Evidence herein, and each of said portions thereof, for the reason that the same is immaterial and irrelevant and that the question of res judicata should be determined by the pleadings in said other action and the decree therein, and that it is unfair to pick from said brief consisting of fifty-one pages, the limited portions therein offered and admitted.

14. That the Court erred in admitting in evidence, over the objection and exception of plaintiff National Surety
199 Company, those portions of Exhibit 9, same being plaintiff's Reply Brief in said other action in the United States Circuit Court of Appeals, shown and designated at pages 68 to 69 of the Condensed Statement of the Evidence herein, and each of said portions thereof, for the reason that the same is immaterial and irrelevant and that the question of res judicata should be determined by the pleadings in said other action and the decree therein, and that it is unfair to pick from said reply brief consisting of thirty-five pages, the limited portions therein offered and admitted.

15. That the Court erred in permitting the defendant Edward E. Jenkins, Receiver, over the objection of the plaintiff National Surety Company, to answer the following question asked of him and to reply as follows, for the reason that the same is immaterial and does not constitute a defense:

Q. So, in order for you to pay fifteen per cent additional, you have to realize from the assets some $237,000 or $240,000?
A. At fifteen per cent, yes.

To this ruling plaintiff National Surety Company duly excepted. (Condensed Statement 16.)

16. That the Court erred in permitting the defendant Ed-J. Jenkins, Receiver, over the objection of the plaintiff National Surety Company, to answer the following question asked of him and to reply as follows, for the reason that the same is immaterial and does not constitute a defense:

Q. Referring again to paragraph 25, on the top of page 10, you set forth in your complaint it will require the sum of $85,000 and some additional to pay the fifteen percent dividend on account of the Groesbeck certificate, is that correct?
A. Yes.
To this ruling plaintiff National Surety Company duly excepted. (Condensed Statement 16½)

17. That the Court erred in permitting the defendant Edward E. Jenkins, Receiver, over the objection of the plaintiff National Surety Company, to answer the following question asked of him, and to reply as follows, for the reason that the same is immaterial:

Q. Let me ask you this question, Mr. Jenkins, if you were required at this time to pay the National Surety Company and Massachusetts Bonding & Insurance Company as general creditors, as claimed in this suit, you would have to pay them sixty percent at once, wouldn't you, to have them paid equally with other creditors? A. Yes.

To this ruling plaintiff National Surety Company duly excepted. (Condensed Statement 17.)

18. That the Court erred in permitting the defendant Edward E. Jenkins, Receiver, over the objection of the plaintiff National Surety Company, to answer the following question asked of him, and to reply as follows:

Q. Referring particularly to the Treasurer of Salt Lake County and the American Surety Company as creditors, and

having in mind, Mr. Jenkins, that they have had in addition to your dividends, $150,000 from the depository sureties, would you be able to pay them out in full in the event you were required to pay sixty per cent to the National Surety Company and the Massachusetts Bonding Company?

Mr. Moreton: Object to that as immaterial and irrelevant, not within the issues and not constituting a defense and being a question that should not be raised here by the Receiver. Seems to me it is no interest of his how many claims are allowed, so long as they are just claims.

A. No.

To this ruling plaintiff National Surety Company duly excepted. (Condensed Statement 17).

19. That the Court erred in admitting, over the objection and exception of the plaintiff National Surety Company, Exhibit 7, same being the application of Treasurer E. J. Groesbeck to the American Surety Company for his official bond in the sum of $200,000.00, for the reason that the same
201 was incompetent, irrelevant and immaterial and not within the issues, not being pleaded and forming no proper defense or any defense, no objection, however, being made thereto because same is a copy. (Condensed Statement 53).

20. That the Court erred in permitting the witness, W. E. McKell over the objection of the plaintiff National Surety Company, to answer the following question asked of him and to reply as follows, for the reason that the same is incompetent, immaterial and not within the issues:

Q. Now, Mr. McKell, will you state to the Court whether or not Mr. Groesbeck has paid anything to the American Surety Company on account of the payment of $223,000 odd dollars which it made to Salt Lake County as the result of the failure of the bank as his official surety?

A. Mr. Groesbeck has made no payment to the American Surety Company.

To this ruliug plaintiff National Surety Company duly excepted. (Condensed Statement 57).

21. That the Court erred in permitting the defendant Edward E. Jenkins, Receiver, over the objection of the plaintiff National Surety Company, to answer the following question asked of him and to reply as follows:

Q. What percentage do you think you would be able to pay to the common creditors of the bank if the claims of the National Surety Company and the Massachusetts Bonding Company were added to the list of claims?

Mr. Moreton: I object to it as immaterial, irrelevant and incompetent. If these claims are to be allowed, it matters not how much would be paid to the creditors of the bank; this claim, I take it, should stand on its own merits.

The Court: You may answer.

Mr. Moreton: Save an exception.

202 A. If the sixty per cent were paid on the $150,000.00 of these two bonding companies, that would take $90,000.00 immediately away from us. It would take $90,000.00 to let them catch up with the rest. That would leave about seven per cent to be paid on the spread over the whole obligation, instead of fifteen per cent. The others who have claims against the bank which have been allowed, would receive sixty-seven per cent instead of seventy-five per cent. (Condensed Statement 84).

Wherefore, plaintiff National Surety Company prays that said decree be reversed or modified and that the United States District Court for Utah be directed to enter its judgment and decree ordering, adjudging and decreeing that the claim of the National Surety Company against said defendant Edward E. Jenkins as Receiver, in the sum of $120,000.00, should be allowed and approved without qualification or limitation thereon, and that the said defendant Receiver be directed to pay to it dividends thereon upon the same basis as have been and will be paid to all other common creditors of the bank; that is to say, sixty per cent immediately and its pro rata portion of all dividends to be hereafter paid by said Receiver; and for such other and further relief as to the Court may appear just and equitable.

A. E. MORETON,
Solicitor for Plaintiff
National Surety Company.

Copy of the foregoing Assignments of Error received this 26 day of March, 1926.

BAGLEY, JUDD & RAY,
Solicitors for Defendant
Edward E. Jenkins, Receiver.

CHENEY, JENSEN, MARTINEAU & STEPHENS,
Solicitors for Interpleaded Defendants American Surety Company and E. J. Groesbeck.

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203 Citation on Appeal of National Surety Company.

In the United States District Court, in and for the District of Utah Central Division.

National Surety Company, a corporation, Plaintiff,
#8851. vs. Equity. (Law)
Edward E. Jenkins, Receiver of the National City Bank, Defendant,
American Surety Company, a corporation, and E. J. Groesbeck, Interpleaded Defendants.

United States of America To Edward E. Jenkins as Receiver of the National City Bank of Salt Lake City, Utah, a National Banking Association, defendant above named, and to American Surety Company, a corporation, and E. J. Groesbeck, County Treasurer of Salt Lake County, interpleaded as defendants—Greetings:

You and each of you are hereby notified that in a certain case in equity in the United States District Court, in and for the District of Utah, Central Division, wherein National Surety Company, a corporation, is plaintiff and Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City is defendant, and the American Surety Company, a corporation, and E. J. Groesbeck, County Treasurer of Salt Lake County, are interpleaded as defendants, an appeal has been allowed the plaintiff National Surety Company, a corporation, therein from the decree entered in said cause by said Court on December 31st, 1925, to the United States Circuit Court of Appeals for the Eighth Circuit. You and each of you are hereby cited and admonished to be and appear in said court at St. Paul, Minnesota, sixty days after the date of this citation to show cause, if any there be, why the

order and decree appealed from should not be correct-
204 ed and speedy justice done between the parties in that behalf.

Dated this 26 day of March, 1926.

TILLMAN D. JOHNSON,
United States District Judge for the District of Utah.

A True Copy.

Teste: John W. Christy,
Clerk U. S. Court, Dist. of Utah,
By W. B. Wilson, Deputy.

Seal
U. S. Dist. Court,
District of Utah.

Received copy of the foregoing Citation on Appeal and due service thereof acknowledged this 26th day of March, 1926.

BAGLEY, JUDD & RAY,
Attorneys for Defendant Edward E. Jenkins, Receiver of National City Bank.

CHENEY, JENSEN, MARTINEAU & STEPHENS,
Attorneys for Defendants American Surety Company and E. J. Groesbeck.

Filed in United States District Court, District of Utah. March 26, 1926. John W. Christy, Clerk, By W. B. Wilson, Deputy.

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205 (Stipulation as to Contents of Transcript.)

It is Hereby Stipulated and Agreed, by and between the undersigned solicitors for the respective parties to the above entitled action, that the Clerk of the above entitled Court, in making up the Transcript on Appeal in said cause, shall include therein the following papers and records:

Date Filed or Entered	
April	28, 1925 Complaint.
June	2, 1925 Demurrer of defendant Edward E. Jenkins, Receiver.
September	28, 1925 Order overruling demurrer.
October	15, 1925 Answer of defendant Edward E. Jenkins, Receiver.
October	17, 1925 Order interpleading American Surety Company and E. J. Groesbeck as defendants.
December	2, 1925 Amended Answer of Interpleaded defendants E. J. Groesbeck and American Surety Company.
December	2, 1925 Plaintiff's reply to answer of defendant Edward E. Jenkins.
December	2, 1925 Plaintiff's Motion to Strike from Answer of interpleaded defendants E. J. Groesbeck and American Surety Company.
December	2, 1925 Plaintiff's Motion to Strike from Answer of defendant Receiver.
December	2, 1925 Plaintiff's reply to Answer of interpleaded defendants American Surety Company and E. J. Groesbeck.
December	2, 1925 Minute order of Court.
December	3, 1925 Amendment to plaintiff's reply to Answer of Defendant Edward E. Jenkins, Receiver.
December	3, 1925 Minute order of Court.
December	31, 1925 Decree of Court.
206 January	16, 1926 Order of Court signed giving plaintiff and appellant National Surety Company to and including March 15th, 1926, within which to serve and file its Condensed Statement of the Evidence.
March	13, 1926 Order of Court signed giving plaintiff and appellant National Surety Company to and including April 5th, 1926, within which to serve and file its Condensed Statement of the Evidence.
March	24, 1926 Condensed Statement of Evidence lodged in Clerk's Office.
March	24, 1926 Stipulation of parties approving Condensed Statement of the Evidence.

March	25, 1926	Order settling Condensed Statement of Evidence.
March	25, 1926	Stipulation waiving bond on part of appellant National Surety Company.
March	26, 1926	Petition for Appeal of appellant National Surety Company.
March	26, 1926	Order allowing appeal of appellant National Surety Company.
March	26, 1926	Assignments of Error of plaintiff and appellant National Surety Company.
March	26, 1926	Citation on Appeal of appellant National Surety Company lodged in Clerk's Office.
March	26, 1926	Praecipe for Transcript on Appeal.

It is further stipulated and agreed that any papers and records in said cause which are not in this stipulation above specified, may be omitted by said Clerk from said Transcript on Appeal.

It is further agreed that this stipulation shall be taken and construed as the Praecipe of each of the respective parties to this action.

Dated March 26, 1926.

A. E. MORETON,
Solicitor for Plaintiff
National Surety Company.

BAGLEY, JUDD & RAY,
Solicitors for Defendant
Edward E. Jenkins, Receiver.

CHENEY, JENSEN, MARTINEAU & STEPHENS,
Solicitors for Interpleaded Defendants American Surety Company and E. J. Groesbeck.

Filed in United States District Court, District of Utah, Mar. 26, 1926. John W. Christy, Clerk, By W. B. Wilson, Deputy.

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207 Certificate of Clerk.

United States of America,
District of Utah—ss.

I, John W. Christy, Clerk of the District Court of the United States for the District of Utah, do hereby certify that

the foregoing pages numbered from one to 208, both included, contain a full, true, correct and complete copy and transcript of the record, papers and proceedings designated in the praecipe for transcript of the record in that certain suit wherein National Surety Company, a corporation, is plaintiff and Edward E. Jenkins, Receiver of the National City Bank is defendant, and American Surety Company, a corporation, and E. J. Groesbeck are interpleaded defendants, numbered 8851, in equity (Law) on the dockets of said Court as full, true, correct and complete as the originals thereof after comparisons with the said originals by me, now remain of record and on file in my office omitting the following papers and proceedings not specified in said praecipe, to-wit:

May 25, 1925, Summons and return.
May 16, 1925, Order time to plead extended to June, 1925.
Sept. 5, 1925, Order for hearing demurrer to complaint set for September 26, 1925.
Sept. 26, 1925, Order continuing hearing to September 28, 1926.
Oct. 28, 1925, Order Court served, filed on return.
Nov. 5, 1925, Answer Groesbeck et al filed.
Nov. 28, 1925, Order set for trial December 2, 1925.

I further certify that the original citation in this cause
208 is hereunto annexed and transmitted herewith.

Seal
U. S. Dist. Court,
District of Utah.

In Witness Whereof I have hereunto subscribed my name and affixed the seal of said Court at Salt Lake City, in said district this 26th day of March, in the year of our Lord nineteen hundred and twenty-six and the one hundred and fiftieth year of the Independence of the United States of America.

JOHN W. CHRISTY, Clerk,
United States District Court,
District of Utah.
By W. B. Wilson, Deputy.

Filed Mar. 30, 1926. E. E. Koch, Clerk.

Appearances of counsel omitted in printing.

Minute entry of argument and submission June 16, 1926, omitted in printing.

In United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1926

No. 7409

National Surety Company, a Corporation, Appellant,

vs.

Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City, Utah, etal., Appellees

Appeal from the District Court of the United States for the District of Utah

Mr. Arthur E. Moreton, for appellant.

Mr. Paul H. Ray (Mr. E. M. Bagley and Mr. Robert L. Judd were with him on the brief), for appellee, Edward E. Jenkins, Receiver.

Mr. John Jensen (Mr. A. M. Cheney, Mr. L. R. Martineau, Jr., and Mr. Harold M. Stephens were with him on the brief), for appellees, American Surety Company and E. J. Groesbeck.

Before Booth, Circuit Judge, and Phillips and John B. Sanborn, District Judges

Opinion—Filed March 28, 1927

Phillips, District Judge, delivered the opinion of the court.

The National Surety Company brought this action against Edward E. Jenkins, as Receiver of The National City Bank of Salt Lake City, Utah, to compel the allowance of its claim upon an indemnity agreement entered into between the bank and the National Company and the pay-

ment of dividends thereon. The receiver answered and prayed that the American Surety Company and E. J. Groesbeck be required to interplead in the action. The court entered an order directing that Groesbeck and the American Company appear in the action and set forth their claims, if any, to the assets out of which the National Company sought the payment of dividends. Thereupon, Groesbeck and the American Company filed their answer. The answers of the receiver, the American Company and Groesbeck set up the decree in the case of Salt Lake County, et al. v. Jenkins, et al., (C. C. A. 8) 5 F. (2d) 34, and alleged that under the doctrine of res adjudicata the National Company was estopped from asserting its alleged claim upon the contract of indemnity and from receiving dividends thereon out of the assets of the insolvent bank. These answers also alleged that the National Company was not entitled to participate in such dividends until the American Company had been paid in full under its right of subrogation to the claim of Salt Lake County.

The facts material to the determination of the questions here involved are these:

Groesbeck was the County Treasurer of Salt Lake County, Utah. On the 3rd day of January, 1921, Groesbeck as principal, and the American Company as surety, executed and delivered to Salt Lake County an official fidelity bond in the sum of $200,000. Groesbeck deposited funds which came into his hands as County Treasurer with the bank. To secure such deposit, the bank, as principal, executed and delivered to Groesbeck three surety bonds, one executed by the National Company as surety, in the sum of $125,000, one by the Fidelity & Deposit Company as surety, in the sum of $75,000, and one by the Massachusetts Bonding and Insurance Company, as surety, in the sum of $25,000. These bonds ran to Groesbeck, Treasurer of Salt Lake County, Utah, as obligee. The bank also deposited with Groesbeck, as collateral security to further secure such deposit, Crystal Lake Farm Company bonds of the par value of $360,000. The bank, in its application to the National Company for the bond executed by it as surety, agreed to indemnify the National Company for all losses it might suffer by reason of its liability as surety under such bond. After the payment by the National Company of its liability under such bond, it assigned to the American In-

demnity Company $5,000 of its claim upon such contract of indemnity.

The bank failed January 17, 1922. At that time, the treasurer's deposit with the bank amounted to $643,094.29. Salt Lake County was paid in full as follows: By the National Company $125,000, by the Massachusetts Company $25,000, by the Fidelity Company $75,000, by the American Company $200,000, and by two dividends paid by the receiver on the deposit of Groesbeck as Treasurer. The first dividend amounted to $170,428.28. The second dividend amounted to $56,809.42. At the time the second dividend was paid, the balance due the county was $47,666.01, leaving an overplus of $9,143.41.

On March 10, 1924, Salt Lake County, Groesbeck as Treasurer, and the American Company brought an action against the receiver, in which they sought a decree directing the receiver to pay out of the second dividend $47,666.01 to Salt Lake County, and the balance of $9,143.41 and all future dividends to accrue on the deposit of Groesbeck, as Treasurer, and the proceeds of the Crystal Lake bonds to the American Company. The plaintiff in that suit asserted that the American Company was subrogated to the rights of Salt Lake County and Groesbeck as Treasurer. The receiver answered setting up that the National Company and Massachusetts Company had paid the sums of $125,000 and $25,000, respectively, on account of the depository bonds executed by them as sureties, and were claiming that they were subrogated to the rights of Groesbeck and the County, and were entitled to the excess of the second dividend and the future dividends to be paid on account of such deposit, and the proceeds of the Crystal Lake bonds, and prayed that they be required to interplead in the action. On March 28, 1924, the court entered its order directing the receiver to pay the sum of $56,809.42, the amount of the second dividend, into the registry of the court to abide the orders and direction of the court, and ordered the National Company and the Massachusetts Company to interplead in the action, and to show cause, if any they had, why the money and the funds claimed by the plaintiffs in such action should not forthwith be paid to such plaintiffs.

The National Company appeared and filed its answer. It set up its claim to subrogation, and also set up the indemnity

agreement, and the fact that it had duly presented its claim thereon to the receiver. The National Company prayed that it be decreed to be entitled to subrogation to its pro rata share of said $9,143.41, and to its pro rata share of all dividends thereafter to be declared by the receiver by reason of the deposit of Groesbeck, as treasurer, and to its pro rata share of the Crystal Lake bonds. It also prayed that the claim of the National Company against the receiver in the sum of $125,000 arising out of such indemnity agreement be allowed and approved, and that the receiver be ordered to pay the National Company dividends thereon. The receiver filed no pleading in response to the answer of the National Company. The American Company filed an answer thereto in which it denied the right of the National Company to subrogation, and also alleged that it had no knowledge or information sufficient to form a belief as to the truth of the allegations relative to the indemnity agreement, and therefore denied the same. The former cause duly came on for trial. At the commencement of the trial a stipulation was entered into between counsel by which it was agreed that the balance due Salt Lake County should be paid out of the fund, and an order was entered directing that such payment be made. Counsel for the American Company and the County thereupon announced that the litigation as it then stood was wholly between the American Company on the one side, and the Massachusetts Company and the National Company on the other side, as to which was entitled to the prior right of subrogation to the balance of the second dividend, to the future dividends to be paid on the deposit of Groesbeck, as Treasurer, and to the Crystal Lake bonds. That was the sole issue tried by the court and determined and adjudicated by its decree. That was the sole issue considered by this court on the appeal of the cause. See National Surety Co. v. Salt Lake County, 5 F. (2d) 34, where District Judge Faris, speaking for the court, said:

"These cases involve the question of appellants' (National Surety Company and American Indemnity Company) right to share, by way of subrogation, in certain dividends in the hands of one Jenkins, and accruing from assets, which came into the hands of Jenkins, as receiver of the National City Bank of Salt Lake City, Utah, which failed

on the 17th day of January, 1922; as also the right of appellants to participate in the proceeds of certain securities in the hands of one Groesbeck.

* * * * * * *

"The single question is whether, upon the facts stated, the law and the equities give these remaining dividends and the proceeds of the Crystal Lake Farms bonds, after the county has been paid in full, to the appellant National Surety Company or to the appellee, American Surety Company."

The instant case duly came on for trial. The trial court held that the decree in the former case was res adjudicata of the right of the National Company to share in dividends until the American Company had been paid in full. It allowed the claim of the National Company, but decreed that it should receive no dividends thereon until the American Company had been paid in full.

The first question presented is whether the decree in the former suit is a bar, under the doctrine of res adjudicata, to the claim and right which the National Company now asserts. In their complaint in the former suit, the American Company and Groesbeck asserted and claimed that the American Company was subrogated to the rights of Groesbeck, as Treasurer, and of Salt Lake County in the excess of the second dividend, in the future dividends, and in the Crystal Lake bonds. The order of interpleader brought the National Company in solely for the purpose of determining whether it or the American Company had the prior right of subrogation to those specific funds and bonds. When the cause came on for hearing, counsel for the American Company and the County announced that the sole question to be determined was whether the American Company or the National Company and the Massachusetts Company were entitled to the prior right of subrogation. While the indemnity agreement of the National Company was pleaded and introduced in evidence, it was upon the theory that it gave a superior equity to the National Company, and because thereof, a prior right to subrogation.

Counsel for the American Company, in a portion of their brief in the former case which was introduced in evidence in the instant case, said:

"As we understand them, the contentions of the National Surety Company are substantially as follows:

I

That the indemnity agreement of the bank, embodied in the bank's application to the National Surety Company for depository bond, gives the National Surety Company a direct legal right, not to indemnity out of the general assets of the bank as such, but to indemnity out of the dividends declared and payable upon the claim of Mr. Groesbeck. * * *

It is * * * clear upon principle, that the indemnity agreement between the Bank and the National must be treated as a separate contractual arrangement affecting only the National and the Bank. Whether it constitutes a sufficient basis for some direct claim against the Bank, is interestingly discussed by the dissenting opinion in the foregoing case of U. S. F. & G. Co. v. Carnegie Trust Company (164 N. Y. S. 92, 221 N. Y. 646), * * * Surely the National cannot because it has an agreement with the Bank for indemnity, push the Treasurer aside before he has been paid in full upon his approved claim, and step in and receive dividends on that claim, either to his exclusion or pro tanto. Certainly a surety of the Bank cannot by virtue of an indemnity agreement with the Bank alone, be entitled to share ahead of a depositor or a depositor's assignee and subrogee.

* * * * * * *

We submit that both upon principle, as a plain matter of contract, and upon the authority of the case above mentioned, there is nothing in the National's so-called indemnity agreement with the Bank that gives it any standing or any rights in the present litigation."

It is clear that the parties, the trial court, and the appellate court, were of the opinion in the former suit that the National Company's direct claim against the bank on its contract of indemnity and the right to dividends thereon were not there involved. The prior right of subrogation to the dividends on the claim of the county and to the proceeds of the Crystal Lake bonds was the sole issue litigated, the

sole question determined by the decree, and the sole question passed upon by this court on appeal. The right of the National Company, because of its contract of indemnity, to participate in the dividends payable on the deposit of Groesbeck as Treasurer was denied, but the right of the National Company to participate in dividends as a general creditor upon the contract of indemnity was neither considered nor determined.

The cause of action asserted by the National Company in the former suit was predicated upon its alleged right of subrogation. The cause of action sought to be enforced by the National Company in this case is predicated upon its contract of indemnity. It is a cause of action which is wholly independent of, and entirely separate and distinct from, the alleged cause of action asserted by the National Company in the former suit. Since the National Company seeks relief in the instant case upon a different and distinct cause of action from the one asserted by it in the former suit, the judgment in the former suit is conclusive only as to such points or questions as were actually in issue and adjudicated therein. Cromwell v. Sac County, 94 U. S. 351, 354; Water, Light & Gas Co. v. City of Hutchinson (C. C. A. 8) 160 Fed. 41, 45; United Shoe Machinery Corporation v. U. S., 258 U. S. 451, 458, 459; Owensboro v. Cumberland T. & T. Co., 230 U. S. 58, 76; 34 C. J., Sec. 1322, p. 911.

In Cromwell v. Sac County, supra, the court said:

"Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

It is true that the National Company, in its answer in the former suit, alleged the contract of indemnity, and

prayed that its claim thereon against the receiver be allowed and approved. But such claim was not a proper subject for litigation in the former suit. It was the subject of an independent suit by the National Company against the receiver. The American Company so contended in its brief on appeal in the former suit. Since it is a matter which could not properly have been litigated, and was not actually litigated, and was not necessarily determined by the decree, in the former suit, it is not concluded by that decree although it was put in issue by the pleadings. Northwestern Port Huron Co. v. Babcock (C. C. A. 8) 223 Fed. 479; Haines v. Welker & Co., 182 Ia. 431, 165 N. W. 1027; Kern v. Wilson, 82 Ia. 407, 48 N. W. 919; Brury v. Smith, 8 Kan. A. 52, 53 Pac. 74; O'Meara v. McDermott, 43 Mont. 189, 115 Pac. 912; Sweet v. Tuttle, 14 N. Y. 465; McGee v. Wineholt, 23 Wash. 748, 63 Pac. 571; American Surety Co. v. White, — Va. —, 1927 S. E. 178; 34 C. J., Sec. 1336, p. 930.

And the fact that National Company set up the indemnity agreement and upon that agreement mistakenly sought the enforcement of a right which did not exist, does not preclude it from seeking in this action, through a different remedy and upon another theory, the enforcement of a right to which it is legally entitled. Barnsdall v. Waltemeyer (C. C. A. 8) 142 Fed. 415; Water, Light & Gas Co. v. City of Hutchinson (C. C. A. 8) 160 Fed. 41, 45; Southern Pacific Co. v. Bogert, 250 U. S. 483, 490; Ash Sheep Co. v. U. S., 252 U. S. 159, 170; Boise Development Co. v. Boise City, 30 Ida. 675, 167 Pac. 1032; 34 C. J., Sec. 1232, p. 815, Sec. 1227, p. 860.

In Boise Development Co. v. Boise City supra, the court said:

"When a party, acting upon a mistaken theory as to his legal rights, brings his action, and is defeated by reason thereof, and afterwards renews the litigation, basing his claim upon a correct theory, the former judgment is no bar to the second action. Black on Judgments, Sec. 733; Hughes v. United States, 4 Wall. 232, 18 L. Ed. 303; Freeman on Judgments (4th Ed.) Sec. 260; 23 Cyc. 1226; Keane v. Pittsburg, etc., Co. 17 Idaho 179-191, 105 Pac. 60; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1, 3 Ann. Cas. 773; Russell

v. Place, 94 U. S. 606, 24 L. Ed. 214; Lockett v. Lindsay, 1 Idaho 324. At most the former case was 'merely illusory and supposititious, and hence it cannot be considered as identical, in any just sense of the term, with the true cause of action correctly set up and supported by a right theory of the facts.' Black on Judgments, Sec. 733."

In Barnsdall v. Waltemeyer, supra, the court said:

"But the fatuous choice of a fancied remedy that never existed, and its futile pursuit until the court adjudges that it never had existence is no defense to an action to enforce and actual remedy inconsistent with that first invoked through mistake."

We therefore conclude that the National Company is not barred from maintaining this action under the doctrine of res adjudicata.

Is the National Company entitled to the allowance of its claim upon the contract of idemnity and to the payment of dividends thereon pro rata with general creditors? This precise question came before this court recently in the case of United States F. & G. Co. v. Centropolis Bank of Kansas City, Missouri, et al. (C. C. A. 8) (Opinion filed February 9, 1927), — F. (2) —. We there held that the Surety Company was entitled to the allowance of its claim and to payment of dividends thereon pro rata with other general creditors. We adhere to our former decision.

The decree appealed from is therefore reversed, and the cause remanded with instructions to enter a decree directing the receiver of the bank to allow the claim of the National Company, for the sum of $120,000, on its contract of idemnity, as a general creditor and to pay dividends thereon pro rata with the other general creditors, including dividends heretofore paid to be general creditors.

The costs of this appeal will be assessed equally against the receiver and American Company.

Filed March 28, 1927.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

DECREE—March 28, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, reversed, the costs of this appeal to be assessed equally against the Receiver and the American Surety Company; and it is therefore further ordered, adjudged and decreed by this Court that the National Surety Company, a corporation, have and recover against Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, the sum of — Dollars, and against the American Surety Company, a corporation, the sum of — Dollars for its costs in this behalf expended and have execution therefor.

And it is further ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with instructions to enter a decree directing Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, to allow the claim of the National Surety Company for the One Hundred Twenty Thousand and no/100 ($120,000.00) Dollars as its contract of indemnity, as a general creditor and to pay dividends thereon pro rata with the other general creditors, including dividends heretofore paid to general creditors.

March 28, 1927.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING—Filed May 23, 1927

Now comes E. J. Groesbeck and the American Surety Company of New York, a corporation, interpleaded defendants and appellees in the above entitled cause, and each of

them, and respectfully petition the Court for a rehearing herein upon the following grounds and for the following reasons:

I

The Court erred in reversing the decision of the District Court of the United States for the District of Utah herein.

II

The Court erred in holding and determining that this cause be remanded with instructions to enter a decree directing the Receiver of the bank to allow the claim of the National Surety Company for the sum of $120,000.00 on its contract of indemnity as a general creditor and to pay dividends thereon pro rata with the other general creditors, including dividends heretofore paid to general creditors.

III

The Court erred in holding and determining that the National Surety Company is entitled to receive anything by virtue of its contract of indemnity with the bank until E. J. Groesbeck and the American Surety Company of New York, his assignee and subrogee, have been made whole, and until E. J. Groesbeck's entire deposit with the bank has been paid.

IV

The Court erred in following and applying to this case its decision in the case of United States Fidelity & Guaranty Company v. Centropolis Bank of Kansas City, Mo., et al., (C. C. A. 8, opinion filed Feb. 9, 1927) — F. (2d) —, and particularly in applying to this case the doctrine of relation back therein announced and thereby holding that the relation of debtor and creditor existed between the National Surety Company and the bank in this case as of the date of the execution of the bond since "the doctrine of relation 'is a legal fiction invented to promote the ends of justice * * *. It is never allowed to defeat the collateral rights of third persons lawfully acquired.' "

V.

The Court erred in failing to hold that as a matter of contract the bond of the National Surety Company stood behind the entire deposit of the Treasurer, E. J. Groesbeck, and that until that deposit has been paid in full and the Treasurer, E. J. Groesbeck, has been made whole, the National can recover nothing on its indemnity agreement.

VI

The Court erred in failing to hold that it is the final amount left unpaid by the National City Bank which was intended to be secured, and which was secured, by the National Surety Company's bond, and that the National agreed to lose $125,000.00 clear before Groesbeck should lose anything and that, therefore the National ought not and cannot by virtue of its indemnity agreement reimburse itself by receiving dividends from the bank in competition with Groesbeck, thereby depleting the very fund from which Groesbeck alone can be made whole, recouping its own loss so that it does not lose $125,000.00 clear, and substantially reducing the amount which Groesbeck would otherwise receive by way of dividends from the bank.

VII

The Court erred in holding that the National Surety Company is not barred from maintaining this action under and by reason of the doctrine of res adjudicata.

We, therefore, respectfully submit that this petition should be granted and upon a rehearing the decision of this Court be set aside and a decree made affirming the decree of the lower court.

A. M. Cheney, John Jensen, L. R. Martineau, Jr., Harold M. Stephens, Attorneys for Appellees, E. J. Groesbeck and American Surety Co. of New York.

Certificate of Counsel.

Comes now A. M. Cheney, Harold M. Stephens and John Jensen and say that they are solicitors for the appellees,

E. J. Groesbeck and the American Surety Company of New York, in this cause, and they hereby certify that the foregoing petition is well founded and is not made for the purpose of delay, and that the decision of this Court in this cause is erroneous, and that said cause ought to be re-examined and re-heard by this Court.

A. M. Cheney, Harold M. Stephens, John Jensen.

[File endorsement omitted.]

In United States Circuit Court of Appeals

[Title omitted]

Petition for Rehearing—Filed May 24, 1927

Comes now Edward E. Jenkins, receiver of the National City Bank of Salt Lake City, Utah, defendant and appellee in the above entitled cause and moves this court for a rehearing herein upon the following grounds and for the following reasons:

I

The court erred in reversing the decision of the District Court of the United States, for the District of Utah, herein.

II

The court erred in holding that the National Surety Company, plaintiff and appellant, was not barred from maintaining this action under the principle of res adjudicata.

III

The court erred in remanding this cause with instructions to enter a decree herein directing this petitioner, as receiver, to allow the claim of the National Surety Company for the sum of $120,000.00, and to approve said claim of the National Surety Company as a general creditor and to pay dividends thereupon pro rata with other general creditors, including dividends heretofore paid to general creditors.

IV

The court erred in holding that the National Surety Company, plaintiff and appellant, is entitled to receive anything from the assets of the said bank until E. J. Groesbeck, Treasurer of Salt Lake County, and the American Surety Company of New York, his assignee and subrogee, have been made whole and until the entire deposit on account of which said E. J. Groesbeck holds receiver's certificate has been paid in full.

V

The court erred in holding that the National Surety Company is a general creditor of the bank and as such entitled to compete with other general creditors of the bank in the bank's assets.

VI

The court erred in holding that the National Surety Company is a general creditor of the bank upon the ground that to so hold is to constitute the deposit of E. J. Groesbeck in the National City Bank of Salt Lake City, Utah, a preferred deposit.

VII

The court erred in following and applying to this case its decision in the case of United States Fidelity & Guaranty Company v. Centropolis Bank of Kansas City, Mo., et al., (C. C. A. 8, opinion filed Feb. 9, 1927) — F. (2d) —, and particularly in applying to this case the doctrine of relation back therein announced and thereby holding that the relation of debtor and creditor existed between the National Surety Company and the bank in this case as of the date of the execution of the bond since "the doctrine of relation 'is a legal fiction invented to promote the ends of justice. * * * It is never allowed to defeat the collateral rights of third persons lawfully acquired.' "

VIII

The court erred in failing to hold that as a matter of contract the bond of the National Surety Company stood behind the entire deposit of the Treasurer, E. J. Groesbeck, and that until that deposit had been paid in full and the

Treasurer, E. J. Groesbeck, has been made whole, the National can recover nothing on its indemnity agreement.

Wherefore, it is respectfully submitted that this petition should be granted and upon a rehearing the decision of this court should be set aside and a decree made affirming the decree of the lower court.

E. M. Bagley, Robert L. Judd, Paul H. Ray, Solicitors for Edward E. Jenkins, Receiver.

Certificate of Counsel

Come now E. M Bagley, Robert L. Judd and Paul H. Ray, and say that they are solicitors for Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City, Utah, defendant and appellee in this cause, and they hereby certify that the foregoing petition is well founded and is not made for the purpose of delay, and that the decision of this court in this cause is erroneous, and that said cause ought to be re-examined and re-heard by this court.

E. M. Bagley, Robert L. Judd, Paul H. Ray.

[File endorsement omitted.]

In United States Circuit Court of Appeals

[Title omitted]

Motion to Amend Decree—Filed May 26, 1927

To the Honorable Judges Booth, Phillips and John B. Sanborn, Presiding in the Above Entitled Case; to Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City, Utah, and Bagley, Judd and Ray, His Solicitors; and to American Surety Company of New York, a Corporation, and Cheney, Jensen, Martineau & Stephens, Its Solicitors:

The undersigned, National Surety Company, appellant in the above entitled action, hereby most respectfully requests and moves the above entitled Court to amend its Opinion and Decree herein by adding to the directions made and given by it to the trial court, with reference to the

payment of dividends to the appellant, in the next to the last paragraph of its Opinion herein, of date March 28th, 1927, the following:

"Together with interest at the legal rate on each of said dividends heretofore declared and paid, as and from the date each of said respective dividends was paid by the said Receiver to the other common creditors of said bank."

And also to add the same direction to the last paragraph of its Decree herein of the same date.

This motion is made for the reason that it is apparent from said Opinion and Decree that it is the intention and purpose of the above entitled Court to place the appellant National Surety Company, upon an equality with all other creditors of said National City Bank, and that this can only be accomplished by allowing this appellant interest on the moneys unlawfully withheld from it, from the respective dates upon which each of said dividends was paid; and that said direction was inadvertently omitted by the above entitled Court from its Opinion and Decree herein.

In making this motion, appellant does not wish to be understood as requesting a rehearing or as desiring the Court to change its opinion in any respect whatsoever, but merely to add to and make more clear and definite the directions contained in its Opinion and Decree herein with reference to the payment of dividends to appellant.

In support of this motion, the appellant, National Surety Company, herewith submits a brief of authorities.

Arthur E. Moreton, Attorney for Appellant National Surety Company.

Certificate of Counsel

Arthur E. Moreton hereby certifies that he is solicitor for National Surety Company, plaintiff and appellant herein, that he prepared the foregoing motion, that the same is well-founded, and is not made for the purpose of delay, and that the same ought to be granted by this Honorable Court.

Arthur E. Moreton.

Argument

The motion herein made by the appellant National Surety Company with reference to the requested additional in-

struction to the trial court respecting the allowance of interest, is made for the reason that it is evident from an examination of the Opinion and the decree of the Court herein, that it is the intention of this Honorable Court to put the appellant creditor of said bank, upon an equality with and in exactly the same position as all other common creditors. The only manner in which this can be accomplished is by allowing the appellant the same dividends as have already heretofore been paid to all other cerditors, together with interest on each of said dividends from the respective dates from which each dividend has been withheld from the appellant.

The direction requested with respect to the allowance of interest, was evidently inadvertently omitted from the opinion and decree herein.

In making this motion, appellant does not wish to be understood as requesting a rehearing or as desiring the Court to change its opinion in any respect whatsoever, but merely to add to and make more clear and definite the directions contained in its opinion and decree herein with reference to the payment of dividends to appellant.

The appellant herein was obliged to resort to judicial proceedings in order to compel the Receiver to allow its claim herein. Under such circumstances, appellant National Surety Company, under all the authorities, is entitled to interest on the dividends as and from the date each of said respective dividends was paid.

"Interest will be allowed on dividends when necessary to put creditors on an equality. Thus, a person establishing his claim against a national bank by judicial proceedings, is entitled to interest on the amount of his dividend from the time the dividend was declared and paid to other creditors." 7 C. J. 849.

The case of Armstrong v. American Exchange National Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. Ed. 747, is directly in point and is cited in support of the foregoing text. In that case, (33 L. Ed. pp. 760-761) the Court said:

"In both of the cases it is claimed that the Court erred in adjudging that the plaintiff was entitled to interest on the 25 per cent dividend on its claim, from October 31, 1887, until the time the dividend should be paid. As authority, the receiver cites the case of White v. Knox, 111 U. S. 784

(28:603). But we do not think it applies. In that case a judgment was obtained for a claim by White, in June, 1883, which included interest on his claim to that time. While the claim was in litigation, the receiver had paid ratable dividends of 65 per cent to other creditors. After the judgment in favor of White, the comptroller of the currency calculated the amount due him as of December 20, 1875, the time when the bank failed, and paid him 65 per cent on that amount. He contended that the dividends should be calculated on his claim with interest to the time of the judgment; but this court sustained the action of the comptroller. In the present case, the claims of the plaintiff, as allowed, do not include interest beyond the date when the bank failed. Interest upon the dividend which it ought to have received on the 31st of October, 1887, is a different matter. The allowance of that interest is necessary to put the plaintiff on an equality with the other creditors. That point was not decided in White v. Knox, and we think the circuit court did not err in allowing such interest."

"Equality is equity," and to put this appellant National Surety Company upon an equality with all other common creditors, as is the manifest intention of this Court, it is necessary to allow and direct the trial court to order the receiver to pay to it interest upon the respective dividends wrongfully withheld from it by the Receiver.

The decision in the case of Armstrong v. American Exchange National Bank, supra, was followed by Chief Justice Taft, when a member of the Circuit Court of Appeals, in his opinion in the case of Chemical National Bank v. Armstrong, 59 Fed. 372, in which he said at page 384:

"Now, a part of the reasonable expense of refusing to pay what is believed to be an unjust claim, but which is held thereafter to be a just one, is the damage from the delay to the person to whom the payment should have been made,—a damage which is measured by interest on the amount due and unpaid during such delay. It is equitable and just, therefore, that the share of the other creditors in the assets of the bank should be reduced by enough to pay the interest on the delayed dividends on the $100,000, from the date of the rejection of the claim until such dividends are paid. This conclusion is fully sustained by the decision of the Supreme Court in the case of Armstrong v.

American Exch. Nat. Bank, 133 U. S. 433, 33 L. Ed. 747. In that case—which also grew out — the failure of the Fidelity Bank,—the creditor bank had presented its claim to the receiver in September, 1887, and it was rejected. The circuit court held that the claim should have been allowed, and adjudged that interest must also be allowed on the dividend declared October 31, 1887, until the dividend should be paid. The Supreme Court affirmed the circuit court, both in regard to the validity of the claim and also as to the interest, saying, upon page 470, 133 U. S., and page 760, 33 L. Ed.: 'The allowance of that interest is necessary to put the plaintiff on an equality with other creditors.' "

Just as in the two foregoing cases, "the allowance of interest is necessary to put the plaintiff (appellant) on an equality with other creditors," and "It is equitable and just, therefore, that the share of the other creditors in the assets of the bank should be reduced by enough to pay the interest on the delayed dividends," to this appellant.

The foregoing cases were decided in accordance with the general established rule.

"Where money or property belonging to another is not paid or turned over to the person entitled to receive it at the time it should be paid or turned over, interest is generally allowed for such wrongful withholding thereof, in which case it is allowed as the just measure of damages for the violation of duty." 33 C. J. p. 203, Sec. 59.

"Interest is the measure of damages for withholding money that is due. In such cases it is allowed at law and in equity." Enc. of U. S. Sup. Ct. Rep., Vol. 7, p. 220, under "Allowance of Interest."

"Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor." Redfield v. Ystalyfera Iron Co., 110 U. S. 174, 176, 28 L. Ed. 109.

"Where money is retained by one man against the declared will of another who is entitled to receive it, and who is thus deprived of its use, the rule of courts in ordinary cases is, in suits brought for the recovery of the money, to allow interest as compensation to the creditors for such loss. Interest in such cases is considered as damages, and does not form the basis of the action, but is an incident to the recovery of the principal debt. The right

of action is the right to compel the payment of the money which is being retained. When he who was has this right commences an action for its enforcement, he at the same time acquires a subordinate right, incident to the relief which he may obtain, to demand and receive interest. If, however, the principal sum has been paid, so that, as to it, an action brought cannot be maintained, the opportunity to acquire a right to damages is lost." Enc. of U. S. Sup. Ct. Rep., Vol. 7, p. 222.

"In a large number of cases, interest is stated generally to be an incident of the debt, apparently without regard to the distinction between interest as damages and contractual interest. Perhaps a proper distinction to be drawn is that where interest is recoverable as damages, it is merely an incident of the principal debt and follows the principal as such incident until it is separated and set apart in some manner as a particular debt." 33 C. J. p. 254, Sec. 176.

"Interest follows the principal as the shadow does the substance." Havender v. Brodbeck, 83 Misc. 9, 11, 144 N. Y. S. 418; Hatcher v. Lewis, 4 Rand (25 Va.) 152, 157. To same effect, McVeigh v. Howard, 87 Va. 599, 13 S. E. 31; Jones v. Williams, 2 Call (6 Va.) 102.

"In equity, interest goes with the principal, as the fruit with the tree." Himely v. Rose, 5 Cranch, 313, 319, 3 L. Ed. 111.

The fact that the defendant is a fiduciary does not change the rule with reference to the allowance of interest on moneys in his hands, as is illustrated by the case of Armstrong v. American Exchange National Bank of Chicago, supra, and Chemical National Bank v. Armstrong, supra.

"Interest is recoverable on judgments rendered against persons in their fiduciary capacities, and affecting the funds in their hands, as upon other judgments." 33 C. J. 215, Sec. 85.

The present action is one in equity, and as is aptly and clearly stated at page 47 of the brief of appellee Jenkins Receiver, "involves not only the necessity of adjudicating the right of the National to have its claim allowed, but a judicial apportionment of the bank's assets and a determination as to the extent to which the National may be en-

titled to participate, and the point of time when such participation might begin. Such relief is equitable. Only a Court of equity can apportion the assets of a bank in receivership to the several persons beneficially interested therein," citing cases.

In 21 C. J. p. 661, under the title "Equity," it is stated:

"And the court has a broad discretion in framing its decrees in order to adapt the relief to the circumstances of particular cases. It will adjust the relief in such a way as to afford fair protection to the rights of all parties, and may grant any relief within the issues made by the pleadings. The primary object of a decree in equity is to reach the ends of justice. Equity procedure is usually elastic enough to accomplish this result, and the court shapes its decree accordingly."

Interest follows the allowance of the claim as a necessary legal consequence, and as a matter of right.

If the appellant National Surety Company is entitled to interest, as we assume that it is, the interest should be at the legal rate, which is eight per cent in Utah, and should be paid on each of the dividends heretofore paid by the Receiver, as and from the date each of said respective dividends was declared and paid by the Receiver to the other creditors of the bank.

The Transcript of the Record herein shows clearly the dates and amounts of dividends heretofore declared and paid by the Receiver. The certificate of the Receiver, issued on the claim of Salt Lake County, appears in the Transcript of the Record at pages 153 to 155, and shows the following dividends to have been declared and paid:

1st dividend, 20%, Paid September 6, 1922.
2nd dividend, 10%, Paid February 27, 1923.
3rd dividend, 10%, Paid May 29, 1924.
4th dividend, 10%, Paid November 8, 1924.
5th dividend, 10%, Paid May 7, 1925.

The claim of the appellant herein was presented to the Receiver of the National City Bank on August 7th, 1922, prior to the payment of any dividends (Tr. 99-105), and demanded that it be reimbursed for the payment made by it. (Tr. 105). This claim was rejected by the Receiver. (Tr. 106).

The appellant, in the prayer of its complaint, prayed that its claim be allowed, that it be decreed that it be "entitled to participate with the other creditors of said bank ratably in all distribution of dividends, including all dividends yet to be paid, as well as those already paid by said defendant Receiver, and that the defendant Receiver be directed to pay to this plaintiff dividends in the amount and upon the same basis as paid to other claimants in the list of common creditors." Without the allowance of interest, appellant will not share ratably nor upon the same basis as other common creditors. The prayer of the complaint is sufficiently broad, particularly since the action is one in equity and inasmuch as the allowance of interest is an incident of the debt and follows the principal and has accrued on the principal in the nature of damages, by reason of the Receiver wrongfully withholding the same. The directions of this Court to the trial court should include the allowance of interest, because "in equity interest goes with the principal as the fruit with the tree."

"Where interest is recoverable as damages and as a legal incident of the debt sued on, or where the allowance is required under equitable principles, interest should be allowed, although no demand is made therefor in the bill or declaration." 33 C. J. p. 257, Sec. 188.

There can be no question but what this Court has the power to add to or amend its directions to the trial court. In the case of Hovey v. McDonald, 109 U. S. 150, 27 L. Ed. 888, the Court said:

"In the present case the correction of the form of the decree by adding the direction to the Receiver to pay over the money in his hands to the defendant, was a thing of course, it was merely expressing the legal effect and consequence of the decree."

In the case of Bank v. Wistar, 3 Pet. 431, 7 L. Ed. 731, where the Clerk of the Court had omitted to enter the judgment of the Federal Supreme Court allowing to the defendant in error on the affirmance of the judgment of the Circuit Court, interest at the rate of six per cent, the Supreme Court, upon motion to amend the mandate, ordered the judgment to be reformed, allowing interest at the rate of six per cent. Such amendments or corrections can be made, or

some ordinary direction which has been omitted should be added, upon motion, without the form or expense of a rehearing.

In the case of Insurance Co. v. Boon, 95 U. S. 117, 125, 24 L. E. 395, Mr. Justice Strong said:

It is a general doctrine that Courts always have jurisdiction over their records to make them confom to what was actually done at the time. * * * Even judgments may be corrected in accordance with the truth."

"We have no doubt of our power at any time to amend a decree which has, by inadvertence or mistake, been entered in a different form from that which we intended." Gaynor vs. U. S., 193 U. S. 451, 48 L. Ed. 745.

In the case of Twin Falls Land Co. vs. Caldwell, 266 U. S. 85, 69 L. Ed. 180, it is stated:

"In our opinion, it is quite admissable in the circumstances, for the Circuit Court of Appeals to change its first decision and correct the mistake therein without granting a rehearing. The parties have been fully heard at the beginning."

Therefore, in view of the fact that the direction requested with respect to the question of interest, was inadvertently omitted, and since it is within the power of this court to add such direction without granting a rehearing, inasmuch as the parties were fully heard at the beginning, and since the dates and amounts of the dividends heretofore paid to other creditors, is in the record, appellant most respectfully requests this Court to grant its motion herein.

Respectfully submitted.

Arthur E. Moreton, Attorney for Appellant National Surety Company.

N. B.—We think the attention of this Honorable Court should be called to the fact that since the record herein was made up, and since the hearing herein, that the American Surety Company has received the sum of approximately $90,000.00 from the sale of the Crystal Lake bonds, which it was authorized to sell pursuant to the decree in the former action. (Tr. 108). This, of course, is not shown by the record, but we conceive it to be, not only our right, but out duty as solicitors of this Court, to call that fact to the

attention of this Honorable Court, inasmuch as it reduces the claim of the American Surety Company by that amount.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

REPLY TO FOOT NOTE OF MOTION TO AMEND DECREE—Filed May 31, 1927

E. J. Groesbeck and the American Surety Company have been served with a purported "Motion to Amend Decree" in the above entitled case. We understand that under the rules of this Court and at this stage of the procedings in the cause we have no right to reply to this purported "Motion to Amend Decree" as such. We shall, therefore, not assume to infringe upon the rules of the Court but shall await an opportunity to reply upon a re-hearing of the case, if the same be granted.

There is, however, a foot note at the bottom of page nine of the purported "Motion to Amend Decree" upon which it is our desire to comment.

The National Surety Company would apparently by this foot note, stating facts off the record, seek to leave an inference that, by payments from the sale of the Crystal Lake bonds and by dividends to be received from the bank, Mr. Groesbeck and his assignee and subrogee the American Surety Company will be paid in full. The purpose is obviously to make inapplicable the principles of law upon which we have relied in our petition for re-hearing, and brief in support thereof, with respect to rights of obligees who have not been paid in full.

The assertion of fact in the foot note in question is not only off the record but the inference sought to be drawn therefrom is incorrect: and the legal principles upon which we are relying therefore still stand applicable in this case. We have, therefore, felt that it was not only our right but our duty to file this brief reply to the foot note.

The payments from the sale of the Crystal Lake bonds were received in December, 1926, and thereafter, all subse-

quent to the trial and argument on appeal of this case, and are, therefore, matters outside of the record. The inference sought to be drawn is incorrect in fact because dependable information furnished us by the Receiver subsequent to the serving upon us of the purported "Motion to Amend Decree," with its foot note, is to the effect that his original estimate of dividends was over-sanguine and that even allowing for the proceeds from the sale of Crystal Lake bonds, now received in full, and all dividends yet to be paid, Mr. Groesbeck will, under the present decision of this Honorable Court, fall short of being paid in full by over Thirty Thousand Dollars ($30,000.00), and it may exceed Forty Thousand Dollars ($40,000.00). This means that Mr. Groesbeck will be owing the amount of this deficiency plus the costs and legal expenses incurred in this extensive litigation, if the decision of this Honorable Court stands, and under these circumstances it would be most unfair to him to have this Court left with any impression or opinion that because of such aggregate payments from the sale of Crystal Lake bonds Mr. Groesbeck is assured, through future dividends from the bank, of being paid in full, when the contrary is, most unfortunately for him,—an innocent party, the situation.

If the petition for re-hearing heretofore filed by Mr. Groesbeck and the American Surety Company in this case is granted we shall be fully prepared to substantiate the foregoing assertions of fact.

Respectfully submitted.

A. M. Cheney, John Jensen, L. R. Martineau, Jr., Harold M. Stephens, Solicitors for Appellees.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

SUPPLEMENT TO PETITION OF EDWARD E. JENKINS FOR REHEARING—Filed June 6, 1927

Subsequent to the filing of our petition for a rehearing of this case, the National Surety Company filed a document

entitled "Motion to Amend Decree." As we understand the rules we are not at liberty to answer that motion. There is, however, appended to that motion a foot note whereby the National seeks to leave the impression with this court that there has been a sale of the Crystal Farm bonds for a sum sufficient to make Treasurer Groesbeck whole on his deposit. We believe that the appendage of that foot note justifies and requires this supplement to our petition for rehearing.

This case was tried and decided upon the evidence presented to the trial court and upon that record the case was argued and submitted to this court.

The national went outside of that record in its foot note in order to advise the court of an asserted change in the situation which arose more than six months after the case was argued and submitted. The National did not, however, conceive it to be its right or duty to advise the court of all changes in the situation affecting the parties. The receiver advises that since the trial of this case the bank's assets have so shrunk that in no event will Treasurer Groesbeck be paid in full. Even if the decision of the trial court should be ultimately affirmed, the Treasurer will not be wholly repaid.

Payments made from the sale of Crystal Farm bonds can have no legal importance in this case unless their effect is to result in full payment to Treasurer Groesbeck and the American Surety Company.

The National by its foot note would leave the ugly inference that defendants and appellees were asking for rehearing of this case after Treasurer Groesbeck and the American had been made whole. How idle such conduct on the part of the treasurer and the American would be! No such inference is justified.

Counsel for the National can attach no importance to the matter contained in his foot note except upon the theory that we have correctly stated the law in our petition for rehearing; and he is therefore, required to go outside the record in an effort to escape by resort to facts not in the record. By the position he now takes he seems to invite a rehearing.

We earnestly submit that this case must be decided upon the record upon which it was tried and not upon that record supplemented by fragmentary suggestions made by counsel upon matters outside the record. We should like nothing

better than an opportunity to judicially establish the truth of the statements herein contained and respectfully urge again that our petition for rehearing be granted.

We are informed and verily believe that the facts herein stated are true and correct and feel that our petition for rehearing should be granted.

E. M. Bagley, Robert L. Judd, Paul H. Ray, Solicitors for Edward E. Jenkins, Receiver, Defendant and Appellee.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITIONS FOR REHEARING AND MOTION TO AMEND DECREE—June 14, 1927

This cause came on to be heard on the petitions for a rehearing, filed by Counsel for appellees, the motion of Appellant to amend the decree and the supplement to petition for rehearing filed by counsel for the appellee Jenkins, as Receiver, etc.

On Consideration Whereof, it is now here ordered by this Court, That said petitions for a rehearing and motion to amend the decree be, and they are each hereby, denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR STAY OF MANDATE—Filed June 21, 1927

Western Union Telegram

Salt Lake City, Utah, Jun. 21, 1927.

1.10 P.

E. E. Koch, Clerk U. S. Circuit Court of Appeals, St. Paul:

Your letter June fifteenth National Surety against Jenkins Receiver Stop Appellees intend filing petition writ certiorari Supreme Court as soon as same can be prepared Kindly show this wire to Court or Judge thereof and

please request order staying issuance mandate and enforcement decree to allow filing our Petition for writ certiorari and advise fully by wire our expense.

Cheney, Jensen, Martineau and Stephens, Bagley, Judd and Ray. 3.18 P.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Staying Mandate—June 21, 1927

Upon consideration of the motion of counsel for the appellees for an order staying the issuance of the mandate to allow the filing of a petition for a writ of certiorari in the Supreme Court of the United States, It is now here ordered by this Court that the issuance of the mandate in this cause, be, and the same is hereby, stayed for a period of sixty days from and after this date, unless otherwise ordered by this Court.

Clerk's certificate to forgoing transcript omitted in printing.

Supreme Court of the United States

Order Allowing Certiorari—Filed October 31, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.